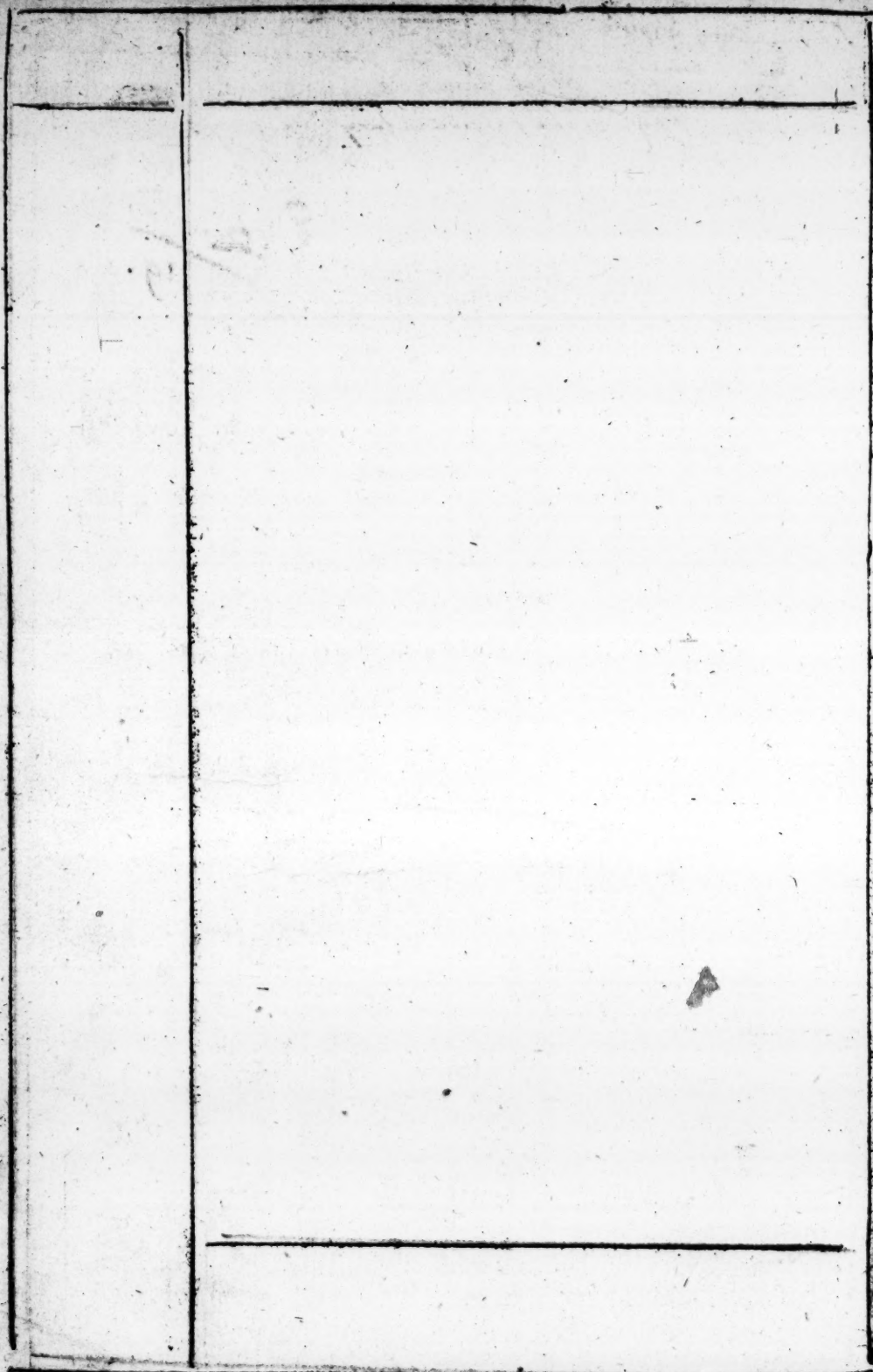


*See the Case of the Port. nat<sup>n</sup>, and L<sup>d</sup> Chancellor  
Lorton's Decree published in Hargreaves new  
Edition of the State Trials.*









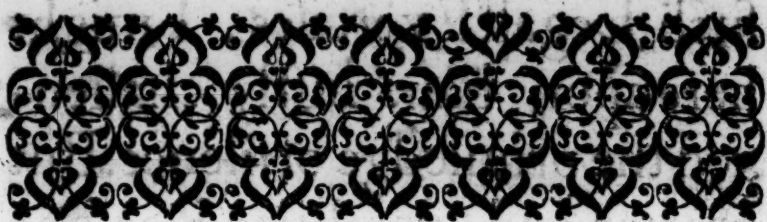
THE SPEECH  
OF THE LORD  
CHANCELLOR OF  
England, in the Eschequer  
Chamber, touching the  
*Post-nati.*



LONDON,  
Printed for the Societie of  
*Stationers. An. 1609.*

*The Printer to the curteous  
Reader.*

**T**Hrough great haste (the common Spoiler of most serious Labours, Hillary Terme being halfe spent ere this Booke could come forth) the word *Non*, in the 45. page, and 1 y. line, of all the Bookes of the first Impression was left out, which altered the Sentence to a cleane contrary Sence: Therefore, in those first imprinted Bookes, for *Quod lego, non credo*, reade *quod non lego, non credo*, according to the correction of that place in these Bookes of the second Impression.



☞ To the louing  
Readers.



Efore I pre-  
sumed to speake  
in the Esche-  
quer Chamber  
in R. C. Case  
(which is now  
commonly called, the Case of  
*Post-nati*;) I considered mine  
age and infirmities, and how  
long I had discontinued from



*To the Readers.*

such Legall Exercises . I might hereupon haue iustly challenged the priuiledge of silence: But greater and weightier Reasons ouer ruled mee , and enforced mee to waieue the benefit of that priuiledge: For, looking into the nature of the Question then in hand , and examining the Circumstaunces, I found the Case to bee rare , and the Matter of great import and consequence, as being a speciall and principall part of the blessed and happy Vnion of great *Britaine*.

I heard many learned and iudicious Arguments ; made by the reuerend Iudges : and finding that they did not all con-



*To the Readers.*

curre in Opinion (though the number was indeede so few, of them that differed, that in *Greece* it woulde not make a plurall number) and that some things were by them omitted, which seemed to mee to be both pertinent to the Matter, and necessary to bee knowne, and more proper and fit to bee spoken by me, respecting the place I should, than by them, that did wholly binde themselves to the forme and rule of legall Argument and Discourse : I thought that I coulde not, in dуетie, sit as a dumbe and idle Hearer onelie: The Cause being iudicially depending in the high Court of

*Chan-*

## To the Readers.

Chancerie, where I was to iudge of it according to Lawe, following the rule of mine owne Conscience, and the measure of mine owne vnderstanding, and not to bee swayed vvith the vveight of other mens opinions.

I considered also, that althogh *Silentij tutum præmium* is often true in humane policie, yet sometime, there is *Crimen Reticientia*; and therefore the Prophet said, *Væ mihi quia tacui*. And *Chrysostome* obserueth, that, *Tribus modis in veritatem peccatur*: 1. *Veritatem præ timore tacendo*: 2. *Veritatem in mendatium Commutando*: 3. *Veritatem non defendendo*. Remembring this, my Con-

science

## To the Readers.

science tould me, that howsoever Silence might in this Case haue excused mee of the second, yet I could not haue escaped by Silence, from offending in the first & last. And if *Festus* thoght it not reason, to send a prisoner, without shewing the Causes which were layed against him, I might haue beene worthily & iustly censured, if vpon other mens arguments, and as it vvere *side implicita*, I should haue pronounced my iudgement and sentence in so great a Cause, vvithout declaring the grounds and reasons vvhereupon I stood. Thus, Duetie and Necessitie (for, *ratio / a pienti necessitas*) were



## To the Readers.

the causes that induced mee to speake in this rare and weightie cause, and the force of truth moued mee to speake that which I did speake, without respect of pleasing or displeasing any. And so, hauing the warrant of a sincere conscience, which is truly said to be, *veluti Comes, & Testis, & Index actionum*, I haue in the Chancerie iudged and decreed the Case for R. C. And the like Iudgement is also giuen by the Iudges of the Kings Bench, in the Afsise depending in that Court. The decree and iudgement being thus passed, diuerse vnperfect Reports, and seuerall patches and pieces of my Speech

erh

haue



*To the Readers.*

haue bin put in writing, & dispersed into many hands, and some offered to the Presse. The Kings M<sup>ie</sup>. hauing knowledge thereof, misliked it, & thereupon commanded me to deliuer to him in writing, the whole discourse of that which I said in that Cause.

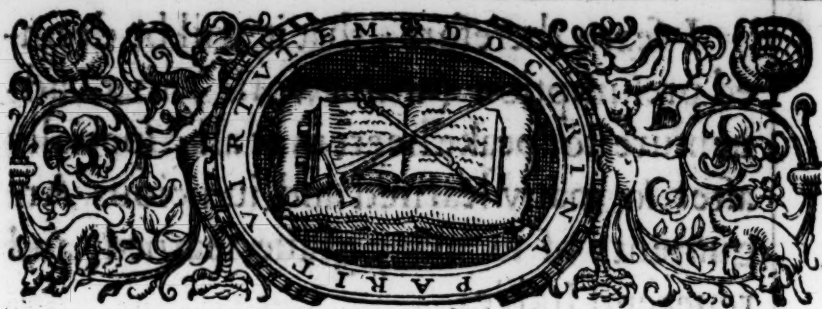
Thus I was put to an vnexpected new labour, to reuiew my scribled & brokē papers. Out of which (according to the charge imposed vpon me) I gathered all which I had before spoken, & so set it downe faithfully & plainly, and (as neare as I could) in the same words I vttered it: it pleased his sacred M<sup>ie</sup>. to take some view of it, & taking occasion thereby,

*To the Readers.*

to remember the diligence of the  
L. chiefe Iustice of the common  
place, for the summary report he  
had published of the Iudges Ar-  
guments, he gaue mee in charge  
to cause this to be likevvise put in  
Print, to preuent the Printing of  
such mistaken and vnperfect  
reports of it, as vvere alreadie  
scattered abroad.

Whatsoever it is, it vvas first  
conceiued & spokē out of con-  
science & duty; and is now pub-  
lished in humble obedience to  
my most gracious Soueraigne.  
And so I offer and commend it  
to your good acceptance and fa-  
uourable interpretation.

*T. Ellesmere Canc.*



Post-nati.

**M**Y Lords, mine age,  
mine infirmitie, and in-  
disposition of health,  
my decaie and weake-  
nesse of memorie, and  
*Desuetudo*, and long dis-  
continuance from this maner of Legall ex-  
ercise (aboue foureteene yeeres) haue be-  
reaued mee of the meanes and helpes that  
should inhable me to speake in so great a  
Case.



I feare therefore , that it will be deemed presumption (if not worse ) that I adventure to speake heerein at all ; specially after so many learned and iudicious Arguments of so many graue, learned, and reuerend Iudges.

To say the same that hath beene saied, must needes be vnpleasaunt , wearisome, and loathsome to the hearers ; and not to say the same , is to speake little to the purpose : for , what more can bee saied than hath beene ?

Yet , for that the Case is depending in *Chancerie*, and adiourned hither for difficultie in Law, & there I must giue iudgement according to the Law, Whether the Complainant bee inhabled, by Lawe , to maintaine his suit in that Court, or not : I holde it more fitting to deliuer the reasons of my iudgement heere , where others haue beene heard, than there, before a few , which haue not heard that which hath beene so learnedly argued, and largely debated heere.

And



And therefore the Case standing thus, I will speake what I thinke : And I must say as one of the graue Iudges saied, I can tell no newes ; But some old things which I haue read and obserued, I will remember ; but I can not diuine, or prophesie *de futuris*, I leaue that as Iustice Yeluerton did.

I am free, and at libertie *Nullius addictus iurare in verba Magistri*, and therefore I will speake ingenuously and freely.

In the arguing of this Case, some things which are of great weight with mee, haue (in mine opinion) beene passed ouer too lightly ; and some other thinges which seeme to me but light, haue beene ouerweighed, as I thinke.

Halfe an howers time longer or shorter I meane not to striue for, and therefore I will presume on your patience, and assume to my selfe such conuenient time as others haue done : And yet I will husband time as well as I can.

I will not be abashed to strengthen my

weake memory with helpe of some scribled papers, as others haue done : for I accompt it a point of wisdom to followe wise mens Examples.

Other *Exordium*, Insinuation, Protestation, or Preface for the Matter it selfe ; either to prepare attentiu and beneuolent auditors, or to stirre offence or mislike against either partie, I meane not to vse ; it is fit for Oratours, I neuer professed the Art, I had neuer skill in it : And it is not *Decorum* for Iudges, that ought to respect the Matter, and not the humours of the Hearers.

The *Exordium* the Ciuilians vse in their Sentences I like well ; *In Dei nomine Amen, & Deo primitus inuocato* ; other *Exordium* I care not for.

The Case.

The Case now depending in *Chaunderie* which is adiourned hither, is thus.

Robert Caluine, sonne and heire apparant of Iames L. Caluine of Colcrosse in the realme

of Scotland, an Infant of three yeares of age, borne in the saied Realme of Scotland, maketh title by his Bill to a Messuage and Garden with th'appurtenaunces in the parish of Saint Buttolph without Bishops-gate in the citie of London: and complaineth against *John Bingley*, and *Richard Griffin*, for detaining the Euidences concerning the same Messuage and Lands, and taking the profits thereof.

The Defendants pleade, that the Plaintiff is an *Alien*, and that in the third yeere of his Maiesties raigne of *England*, and in the nine and thirtieth yere of his Maiesties raigne of *Scotland*, hee was borne in the Realme of *Scotland*, within the ligeance of his saied Maiestie, of his Realme of *Scotland*, and out of the ligeance of our soueraigne Lord the King of his Realme of *England*.

And the Defendants say further, That at the time of the birth of the Complainant, and long before, and ever since, the saied Kingdome of *Scotland* was, and still is, ruled and gouerned by the proper



Lawes and Statutes of the said Kingdome of *Scotland*, and not by the Lawes and Statutes of this Realme of *England*. And therefore the Defendants demaund iudgement, Whether the Complainant ought to bee answered to his said Bill, or shall be receiued to prosecute the said suite against the Defendants, being for, and concerning the title of Inheritance, and euidence touching the same.

Heereupon the Complainant hath demurred in Law.

This is the speciall Case now depending in the *Chancerie*; in which, and touching all like Cases in generall, mine opinion is, and since the question was first mooued hath beene, That these *Post-nati* are not *Aliens* to the King, nor to his Kingdome of *England*, but by their Birth-right, are liuge subiects to the King; and capable of estates of Inheritance, and freehould of Landes in *England*: and may haue and



maintaine as wel Reall as Personall actions for the same. And that therefore the now Complainant *Robert Caluine* ought to bee answered.

This opinion I did first conceiue vpon those rules and reasons in Lawe (as well the Common Law of *England*, as the *Ciuile* law) which heereafter in the course of my Speech I will remember. And in this opinion I haue beene since confirmed by many great and weighty reasons.

First, in the *Statute* made in the first yeare of his Maiesties raigne of *England*, authorizing the Treatie betweene the Commissioners for both the Kingdomes, it is said (as Iustice *Warburton* noted well) That both the famous & ancient Realmes of *England* and *Scotland*, are now vnited in allegiance and loyall subiection in his royall person, to his Maiestie, and his posteritie for euer.

Heere wee haue the Iudgement of the Parliament, that there is a Vnitie in alleg-

The proceeding in the  
generall Case of  
*Post-nati*,  
*Stat. 1. Jac.*  
*19. Mart. 1603*

ance to one Royall person; And therefore I see not how wee may out of imaginarie conceits, and by subtile distinctions straine our wittes to frame severall allegiances to one and the same Royall person, contrary to so plaine a declaration made by Parliament.

The Proclamation,  
2. Jacobi 20.  
Octobr. 1604.

— 223019 on T  
— 23 701 m gmb  
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— 223019 on T  
— 23 701 m gmb  
20 212 112121  
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Next followeth his Maiesties Proclamation 20. Octobris 1604. by which hee assumed to himselfe the Name and Stile of King of great Britaine. In which Proclamation, among many other weighty reasons, this is added for one, *We have retained from those that be skilful in the Lawes of the Land, That immediatly upon our succession, diuerse of our auncient Lawes of this Realme are ipso facto expired, as namely, that of Escuage, and of the naturalization of the Subiects. This was not done sodainely, nor lightly; but upon grave and serious deliberation, and aduise: And therefore seemeth to mee to be a matter of great importaunce, and not to be lightly regarded.*

The same twentieth of October, these Commissioners beganne their Treatie. Of the graue and iudicious Course which they held, in debating of the Matter then propounded, I will forbear to speake: But for this point of Naturalization now in question, their resolution in the end was thus:

That it shall bee propounded to both the Parliaments at the next Sessions, that an Act be made containing a declaration, as followeth: That all the Subiects of both the Realmes, borne since the decease of *Elizabeth* the late Qu. of *England* of happie memory, and all that shalbe borne hereafter vnder the obedience of his Maiestie, and his royall Progeny, are by the common Lawes of both the Realmes, and shall be for euer, inhabled to obtaine, succcede, inherite, and possesse all *Lands, Goods, and Chattels, &c.* as fully and amply as the Subiects of either Realme respectiuey might haue done, or may doe in any sort within the Kingdome where they were borne.

The Commissioners authorized by Parliament, did begin 20. Octob, and did continue vntill 6. Decemb, 2. Jacobi.

The resolution of the Commissioners.



This, after long debating, and graue and deliberate consideration, was, in the end, the resolution of the greater part of the Commissioners, not one openly gaine-saying it. And diuerse of the principall Iudges of the Realme were present at all times when the point was debated. And herein I note the wise and iudicious forme of that resolution, which was not to propound to the Parliament the making of a new Lawe, but a declaration of the common Lawes of both the Realmes in this question.

Now, if wee consider who these Commissioners were, what Lords of the higher House, and what persons of the common House, selected of all degrees, most eminent for their learning and iudgement, as well in Ciuile and Common Law, as in knowledge, and experience other waies, beeing assisted by the graue Iudges of the Realme: If this, I say, be well considered, then this Resolution must be accompted and esteemed as a matter of

great and weighty importance, and much to be regarded in the deciding of this question.

According to this Act of the Commissioners, the Case was propounded in the next Session of Parliament. In the higher House, the Iudges were required to deliver their opinions. There were then eleven Iudges present ; whereof tenne did with one vniforme consent affirme the Lawe to be, That the *Post-nati* were not Aliens, but naturall subiects (one onely dissenting.) After this, the Question was debated in a solemne Conference betweene both the Houses of Parliament at severall times, and at great length, and with much libertie : Nothing was omitted that Wit or Art could inuent to object against this opinion ; And that was done by men of great learning, and singular iudgement in the Common Lawe, and Ciuile Lawe ; and by some other Gentlemen of the Common House, of rare

The Iudges  
opinion in  
Parliament.

gifts for their learning, knowledge, elocution and experience.

At this Conference the Iudges were present ; who , after they had heard all that was , or could be said , did confirme their former opinions , which they had before deliuered in the higher House : Three of the chiefe of them declaring their reasons, and all the rest (sauing one alone) concurring in the same . So , here was now a generall resolution by all the Iudges of the Realme (one excepted ) and that deliuered , not priuately , but in Parliament ; which without more adoe had beene sufficient to haue decided and determined this Question.

The force and  
strength of the  
Kings procla-  
mations.

Touching the Proclamation, it was discreetly and modestly saied by a learned Gentleman of the lower House , That it was of great respect , and much to bee regarded ; but yet it was not binding , nor concluding : for, Proclamations can neither make , nor declare Lawes : And be-

alig

20

fides,



sides, that this Proclamation was not grounded vpon any resolution of the reuerend Iudges; but vpon the opinion of some skilfull in the Lawes of this Land.

Of the strength of Proclamations, being made by the King, by the aduise of his Counsell and Iudges, I will not discourse; yet I will admonish those that bee learned and studious in the Lawes, and by their profession are to giue counsell, and to direct themselues, and others, to take heede that they doe not contemne, or lightly regard such Proclamations.

And to induce them thereunto, I desire them to looke vpon, and consider aduisedly these few Proclamations, Prouisions, or Ordinaunces, which I will point out vnto them; and of what validitie and force they haue beene houlden to bee in construction of Lawe, albeit they be neither Statutes, nor Acts of Parliament.

M.4.H.3. in *Dower*, the defendant pleaded, *Quod petens est de potestate Regis Francie, & residens in Francia; Et prouisum est*

Fitzh. Dower.  
179.

à Consilio Regis, quod nullus de potestate Regis Francie respondeatur in Anglia antequam Angli respondeantur de iure suo in Francia. This the Plaintifes Atturney could not denie; and thereupon the iudgement was, *Ideo sine die.*

Anno 20. Hen. 3. certaine Prouisions and Ordinaunces were made which were called *Prouisiones Merton*, where the King assembled his Archbishops, Bishops, Earles, and Barons for the Coronation of the King, and his wife Queene Elenor; and the words be, *Prouisum est in curia Dom. Regis apud Merton corā Willihelmo Cantuariensi Archiepiscopo, & Coepiscopis, Suffraganeis suis; Et coram maiori parte Comitum & Baronum Angliæ ibidem existentium pro Coronatione ipsius Domini Regis & Helionoræ Regine, pro qua omnes vocati fuerunt: Cum tractatum esset de communi vtilitate Regni super articulis subscriptis. Ita prouisum fuit & concessum, tam a prædictis Archiepiscopis, Episcopis, Comitibus, & Baronibus, & alijs. De viduis primâ &c.*

Fitzherbert citeth a Prouision made Anno 19.H.3. in these words, *Et prouisum fuit coram Domino Rege, Archiepiscopis, Episcopis, Comitibus, & Baronibus, Quod nulla Assisa vltime presentationis de cetero capiatur de Ecclesiis, Præbendatis nec de Præbendis.* This Prouision was allowed and continued for Lawe, vntill W. 2. Anno 13. Edw. 1. ca. 5. which prouides the contrary by expresse words.

Anno 6. Ed. 1. the King and his Iudges made certaine Explanations of the Statute of Gloucester, which are called, *Explanaciones statuti Glocestrie*: And these be the words. *Postmodum per Dominum Regem & Iusticiarios suos factæ sunt quedam Explanaciones quorundam articulorum superius positorum.* Which Explanations haue euer since beene receiued as a Law.

There is a Proclamation by King Ed. 3. bearing Teste at Westminster Anno 15. Edw. 3. And Iudge Thorpes opinion Pa. 39. Ed. 3. 7. both which I will now forbear to report, and wish the Students to reade the same

Fitzherbert  
Nat. Br. 32.

Anno 6. Ed. 1.  
Explan. Stat.  
Gloucestr.

A Proclamation.  
15. Ed. 3.



in the printed Bookes, where they shall see both the effect, and the reason, and the cause thereof; They are worth their reading, and may informe and direct them what iudgement to make of Proclamations.

How the Iudges opinion delivered in parliament ought to be regarded.  
*Obiect.*

Touching the opinion of the Iudges, some haue obiected (yet modestly, and I suppose, according to their conscience and vnderstanding) That there is not like regarde to be had of Iudges opinions giuen in Parliament, as ought to bee of their iudgements in their proper Courts and Seates of Iustice: for, in those places their Oath bindeth them; but notso in the other.

*Respons.*

1. To this I answere: The reuerence, and woorthinesse of the men is such, as is not to bee quarrelled and doubted of, if there were no Oathe at all: For, if men of so great and eminent places feare not God and his iudgements, euen out of a

religi-

religious conscience, which is *Frenum ante peccatum*, & *flagrum post peccatum*, it may be doubted that the externall ceremonie of adding a Booke will little auaille.

2 Their Oath doth bind them as much in the Court of Parliament, as in their proper Courts : for, that is the supreme Court of all ; and they are called thither by the Kings Writ, not to sit as Tell-clocks, or idle hearers ; but, *quod personaliter interfutis nobiscum, ac cum ceteris de Consilio nostro super dictis negotijs tractaturi, vestrumq; Consilium impensuri* : And those *Negotia* be *Ardua* & *urgentia negotia Regni* &c. And their Oath, amongst other things, is, That they shall counsell the King truely in his businesse.

3 This Exception may serue against the Iudges, as well in Cases when they sit and giue iudgement, as Iustices of Assises, *Nisi prius*, Oyer and Terminer, and Gaole Deliuerie, as in this Case of Parliament : for, there they haue none other Oath but their generall Oath.

4 It becomes vs to esteeme of Iudges now ; as our forefathers esteemed them in times past ; for , as they succeede them in Time and Place ( I thanke God , and the King , I haue neither cause to feare any for displeasure , nor to flatter any for fauour : wherefore I will neither be afraid , nor abashed to speake what I thinke : ) I say therefore , that as our Iudges now succeed the former Iudges , in Time and Place ; so they succeede them , and are not inferior to them in Wisedome , Learning , Integritie , and all other iudicious and religious Vertues.

Then let vs see what the wisedome of Parliaments in times past attributed to the Iudges opinions declared in Parliament ; Of which there bee many Examples ; but I will trouble you but with two or three.

I wil not remember *Richard* the seconds time ( of which some of our Chroniclers doe talke idely , and vnderstand little ) where power and might of some potent



persons oppressed iustice, and faithfull Iudges, for expounding the Law soundly, and truely. The first that I will remember, is this.

In the Parliament 28. H.6. 16. *Ianuarij*, the Commons made suite, That *W. de la Poole* Duke of *Suffolke* should bee committed to prison for many treasons and other hainous crimes committed by him. The Lordes in Parliament were in doubt what answer to giue; they demaunded the opinion of the Iudges: Their opinion was, That hee ought not to bee committed; And their reason was, for that the Commons did not charge him with anie particular offence, but with generall flaunders and reports; And therefore because the Specialties were not shewed, hee was not to bee committed. This opinion was allowed; And thereupon 28. *Ianuarij*, the Commons exhibited certaine speciall Articles against him, *viz.* That hee conspired with the French King to inuade

the Realme &c. And thereupon hee was committed to the Tower.

2 In the Parliament Anno 31. H.6. in the vacation ( the Parliament being continued by prorogation ) *Thomas Thorpe* the Speaker was condemned in a thousand pounds dammages in an action of Trespasse, brought against him by the Duke of *Yorke*, and was committed to prison in Execution for the same. After, when the Parliament was re-assembled, the Commons made suite to the King and the Lords, to haue *Thorpe* the Speaker deliuered, for the good exploite of the Parliament; whereupon the Duke of *Yorkes* Counsell declared the whole Case at large. The Lords demaunded the opinion of the Iudges, whether, in that Case, *Thorpe* ought to bee deliuered out of prison by Priuiledge of Parliament: The Iudges made this aunswere, That they ought not to determine the Priuiledge of that high Court of Parliament; But for

the declaration of proceeding in lower Courts, in cases where Writtes of *Superfedeas* for the priuiledge of the Parliament be brought vnto them, They aunswered: That if any person that is a Member of the Parliament bee arrested in such cases as bee not for treason or felonie, or for suretie of Peace, or condemnation had before the Parliament, it is vsed that such persons be released; and may make Atturney, so as they may haue their freedom and libertie, freely to intend the Parliament. Hereupon it was concluded, That *Thorpe* should still remaine in prison according to the Lawe, Notwithstanding the priuiledge of Parliament, and that hee was the Speaker. Which resolution was declared to the Commons by *Walter Moyle*, one of the Kings Serieants at Lawe. And then the Commons were commaunded in the Kings name, by the Bishop of *Lincolne* (in the absence of the Archbishop of *Canterbury* then Chauncellor) to choose another Speaker.

Writtes of  
Superfedeas  
for the priuiledge  
of the Parliament



3 In the Parliament *An.7.H.8.* a Question was moued, Whether spirituall persons might bee conuented before temporall Iudges for criminall causes ; There sir *John Fineux* and the other Iudges deliuered their opinion, that they might and ought to bee so. And their opinion was allowed, and maintained by the King and the Lords : And *D. Standish*, who before had houlden the same opinion, was deliuered from the Bishops. And it is worth the noting, what wordes passed in that Case betweene the Archbishop of *Canterbury*, and that worthy Iudge *Fineux*.

Writs of Errour  
sued in  
parliament.

4 If a Writ of Errour bee brought in Parliament vpon a Iudgement giuen in the Kings Bench, the Lords of the higher House alone (without the Commons) are to examine the Errours ; But that is by the aduise and Counsell of the Iudges, who are to informe them what the Lawe is, and so to direct them in their iudgement. And if the iudgement bee reuerfed,

then

then commaundement is to bee giuen to the Lord Chancellour to doe Execution accordingly. And so it was in *Anno 17. R. 2.* in a Writte of Errour brought in Parliament by the Deane and Chapiter of *Lichfield*, against the Prior and Couent of *Newport-Panell*, as appeareth by the Record. But if the iudgement bee affirmed, then the Court of the Kings Bench are to proceede to execution of the Iudgement, as it appeareth in *Flowerdewes Case P. 1. H. 7.* fol. 19. But it is to bee noted, that in all such Writtes of Errour, the Lords are to proceede according to the Lawe; and for their iudgement therein they are informed and guided by the Iudges, and doe not follow their owne opinions or discretions otherwise.

This extrauagant Discourse touching Proclamations, and Iudges opinions deliuered in Parliament, and how they ought to bee regarded, I haue thought materiall and necessarie, both in respect

of

of the time wherein wee liue, and the Matter which we haue in hand : And these bee thinges which I thinke haue beene too lightly passed ouer : But if you condemne it as impertinent, I must then confesse I haue presumed too much vpon your patience; I pray you beare with mee, it is but my labour lost, and a little time mis-spent, if it seeme so vnto you : You are wont to pardon greater faultes ; Call it either a *Passé-time*, or *Waste-time*, as pleaseth you. Now, to returne to the Case we haue in hand.

The proceffe  
and forme of  
proceeding in  
the Case of R.  
C. now in que-  
stion.

The generall Question hauing had this passage ( by Proclamation, by Commission, and by debating in Parliament) remaineth yet without cōclusion or iudgement : And as euerie man abounds in his owne sence, so euery one is left to his owne opinion ; Specially those that were not satisfied with the graue Resolution of the Iudges in Parliament, which (although some may tearme and accompt



as bare opinions) I must alwayes vallow, and esteeme as a reall and absolute iudgement. Now, I say, this generall Question is reduced to two particular Cases, and is iudicially depending in two the highest Courts of Iustice in this Realme; and that is by one Complainant against severall Defendants for the freehoulde and inheritance of severall parcells of Land: and (as M. Solicitor said well) is a Case, not fained, nor surmised, but a true Case betweene true parties: And being *Quaestio iuris, non facti*, is by both these Courts adiourned hither to bee decided, and determined by all the Iudges of *England*, as the rarenesse of the Case, and the weight and importaunce of it, both for the present and the future doth require.

And the Case being of this nature and qualitie, it is not amisse to obserue the proceeding in it: for, it is woorth the observing, and not to bee forgotten. The Defendants counsell, men of great learning, and in their profession inferiour to

none of their qualitie and degree, men conuerfant and well exercised in the Question, and such as in the great conference in parliament, most of them were specially selected & chose (for so they wel deserued) as most sufficient, able, and fit, as well for Learning and Knowledge, as for all other giftes of Witte and Nature, to handle so great and rare a Question. And although it hath pleased them of their good discretion to vse the paines but of a few in the debating and arguing of the Case at the Barre: yet no doubt that was done vpon mature deliberation and conference with all the residue: And whatsoeuer the Spiritues, the Learning, the Wisedome, and Knowledge of all the others, vpon long study could affoorde, was put into the mouth of those few to serue as Organs and Instruments to deliuer it vnto vs; which they haue so well and sufficiently performed, that they deserue great praise and commendation: For, in my poore opinion, the witte of man could not de-

uise to say more touching this Question in Lawe than they haue said. And whatsoever hath beene since spoken for that part, it is for the Matter but the same in substance, which he counsell at the Barre did deliuer; though it hath beene varied in forme, and amplified with other wordes and phrases, and furnished with shew of some other strained Cases and authorities.

The handling of it by the learned and reuerend Iudges, hath beene such, as it may appeare to the world, that euerie one hath spoken his owne heart and conscience; and hath laboured by long studie to search out the Lawe and the true reason of the Lawe in this rare Case; and so they haue spoken, as *Coram Deo & Angelis*: None, with desire to seeme popular; for nothing ought to be *tam popolare quam veritas*: None to seeme to be Time-servers, or Men-pleasers; for the King (whome vnder God they serue) being *Pater patrie*, and soueraigne head of both these great



vnited Kingdomes, is to them both, like as the head of a naturall body is to all the Members of the same, and is not, nor can not bee partiall more to one than to another. Hee deliteth in truth, and desireth it; and without truth hee can not bee pleased. Hee ruleth by his Lawe, and commaundeth his Iudges to minister to all his Subiects Lawe and Iustice sincerely, and truely; and equally and indifferently, without any partiall respect.

It was neuer seene, but that in all rare and difficult Cases, there haue beene diuersitie of Opinions; but yet without breach of Charitie, which is the Bond of Vnitie. So it hath happened in this Case. The Case hath beene argued at large by foureteene learned Iudges; twelue of them haue concurred in iudgement, but vpon seuerall reasons: for, as many wayes may leade to one end of the iourney; so diuerse and seuerall reasons may conduce to one true and certaine conclusion.

belong

as I

And

And here I may not omit the woorthie memorie of the late graue and reuerend Iudge, Sir *Iohn Popham*, chiefe Iustice of the Kings Bench deceased (a man of great wisdom, and of singular learning and iudgement in the Lawe) who was absolutely of the same opinion, as he often declared, as well in open Parliament, as otherwise.

The Apostle *Thomas* doubted of the Resurrection of our Sauour Iesus Christ, when all the rest of the Apostles did firmly beleue it; But that his doubting confirmed, in the whole Church, the Faith of the Resurrection.

The two woorthy and learned Iudges that haue doubted in this Case, as they beare his Name, so I doubt not but their doubting hath giuen occasion to cleare the doubt in others; and so to confirme in both the Kingdomes, both for the Present and the Future, the truth of the iudgement in this Case.

Thus, my Lords, haue you hitherto nothing from mee but *Amen*, to that which all the Iudges (sauiug two) haue saied; and much more you cannot expect from mee: Yet, since I must giue iudgement in this Case; and I saied in the beginning, that I would render the reasons of my iudgement: (for that is the course of argument I must houlde) I will now deliuer vnto you, what are the speciall and principall reasons that first haue induced mee, and still mooue mee to houlde the opinion that I doe: And as I goe I will indeuour to cleere some doubts and questions, that partly in the conference in Parliament, and partly otherwise, I haue heard made; not onely touching this Case it selfe, but also touching the forme and manner how it is to be decided and iudged.

How this Case  
is to be iud-  
ged, and by  
what Law.

The Case is rare, and new, (as it hath beene often saied) it was neuer decided *Terminis terminantibus*; It was neuer iudged by any Statute Lawe, which is a po-



sitive Lawe; nor by iudgement of the Iudges of the common Lawe.

Now, the first Question is (as some would haue it) How it is to be iudged, and by what Lawe; and haue wished that it might haue stayed vntill the Parliament, and so bee decided by Parliament. They that make this doubt, I will let them demurre, and die in their doubts: For, the Case beeing adiourned hither before all the Iudges of *England*, is now to be iudged by them according to the common Lawe of *England*; and not tarrie for a Parliament: For, it is no transcendent Question, but that the common Lawe can and ought to rule it, and ouer-rule it, as Iustice *Williams* said well.

But then this Question produceth another; That is, What is the Common Lawe of *England*; Whether it be *Ius scriptum*, or *non scriptum*; and such other like niceties: For, wee haue in this Age so many Questionists; and *Quo modo* and *Quare*, are so common in most mens

What is the  
common Law  
of England:  
& whether it  
be *Ius scriptum*

Questionists

mouthes,

mouthes, that they leaue neither Religion, nor Lawe, nor King nor Counsell, nor Policie, nor Gouvernement out of question.

And the end they haue in this Question, What is the Common Lawe? is to shake and weaken the ground and principles of all gouernement: And in this particular Question of the Law of *England*, to ouerthrow that Law whereby this Realme hath many hundred yeares beene gouerned in all honour and happinesse: or at least to cast an aspersion vpon it, as though it were weake and vncertaine. I will therefore declare mine opinion in this point plainly and confidently, as I thinke in my conscience, and as I finde to be sufficiently warranted by ancient Writers, and good authorities voide of all exception.

The ground  
of the Com-  
mon Law.

The common Law of *England* is grounded vpon the Law of God, and extendes it selfe to the originall Lawe of Nature, and the vniuersall Lawe of Nations.

continuum

When

When it respects the Church, it is called *Lex Ecclesiæ Anglicanæ*, as *Magna Charta* ca. 1. *Ecclesiæ Anglicanæ habeat omnia sua iura integra & illæsa.*

When it respects the Crowne, and the King, it is sometimes called *Lex Coronæ*, as in Stat. 25. Edw. 3. cap. 1. *Lex Coronæ Angliæ est & semper fuit &c.* And it is sometimes called *Lex Regiæ*, as in *Registro* fo 61. *Ad iura Regiæ spectat : And, Ad conseruationem iurium Coronæ nostræ, & ad iura Regiæ ne depereant &c.*

When it respectes the common subiects, it is called, *Lex Terræ*; as in *Magna Charta* ca. 29. *Nisi per legale iudicium parium, vel per legem Terræ.*

Yet, in all these Cases, whether it respectes the Church, the Crowne, or the Subiects, it is comprehended vnder this generall tearme; The common Lawes of England: Which although they bee for a great parte thereof reduced into writing; yet they are not originally *Leges scriptæ.*

This I first learned of the late Lord Trea-

The common Law is not originally *Lex scripta.*

ſurer *Burleigh* ( whose Honourable memorie *England* can neuer forget ) and hearing it from him , I indeuored by my priuate ſtudie to ſatiſſie my ſelfe thorowlie in it. And , whoſoeuer ſhall well conſider the Lawes of *England* , which were before the Conqueſt ( whereof wee haue ſome Remnants and Patches ) or ſince the Conqueſt vntill *Magna Charta*, Anno 9. H.3. will make little doubt of it.

In H.2. time *Glanuile* writeth thus; *Leges Anglicanas licet non ſcriptas, leges appellari non videtur absurdum.*

And in Hen. 3. time *Bracton* writeth thus; *Cum autem ferè in omnibus Regionibus vtantur legibus & iure ſcripto, ſola Anglia vſa eſt in ſuis finibus iure non ſcripto & conſuetudine; in ea quidem, ex non ſcripto Ius venit quod vſus comprobauit.*

But I may not agree with *Bracton* , that *Sola Anglia vſa eſt iure non ſcripto*. For I find that the graueſt , and the greateſt learned Writers of the *Ciuile Lawe* , both auncient



and of this our time, doe hould the same opinion, touching the Ciuile Lawe it selfe, for thus they write : *Ex non scripto Ius venit quod vsus approbavit.* And thus; *Ius Ciuile dictum ex non scripto natum est.* And; *Ius non scriptum dicitur Consuetudo, non quod scripto perpetuo careat, hoc enim falsum est. Nam & Consuetudines in memoriam constantiorem reducuntur in Scripturam, ut cetera quoq; quæ sine scriptura perficiuntur: Sed non scriptum ius est: id est, quod à scriptura vis eius non cœpit nec pendeat.* So, hereby it may appeare how in this wee concurre with the Ciuile Lawe.

But hereupon these Questionists moue an other Question, viz. If the common Lawe be not written, how then shall it be knowen?

How the common Law of England may be knowne.  
*Obiect.*

To this I aunswer; It is the common custome of the Realme (as *Bracton* saith, *Ius venit quod vsus comprobauit;*) And it

*Respons.*

standeth vpon two maine pillers & principall parts, by which it is to bee learned and knowen.

Maximes and Principles.

The first is, certaine knowne principles and Maximes, and ancieut Customes, against which there neuer hath beene, nor ought to bee any dispute. As in Cases of Subiects; an estate in Fee-simple, for life, for yeeres, Dower, Curtesie &c.

In Cases of the Crowne, the Female to inherite: the Eldest sole to bee preferred: No respect of Halfe Blood: No tenant in Dower, or by the Courtesie of the Crowne: No disabilitie of the Kings person by infancie &c.

*Responsa prudentum.*

The second is, where there be no such Principles, then, former iudgements giuen in like Cases: And these be but *Arbitria Iudicum*, & *Responsa Prudentum*, receiued, allowed, and put in practise and execution by the Kings authoritie.

Of these *Bracton* speaketh ; *Ego H. de Bracton animum erexi ad vetera Iudicia iustorum perscrutanda ; facta ipsorum, Consilia, & Responfa in vnam summam redigendo compilavi.*

And before the Conquest, King *Ethelbert* caused a Booke to bee made, which was called *Decreta Iudiciorum* : And king *Alured* did the like, as master *Lambard* a iudicious and learned obseruer of Antiquities, doth remember.

*Lambard in explicatione verbi Hyde.*

Of these also the Iudges speake *H.33. H.6. Moyle, fo.8. We rule the Law according to the auncient course. Ashton, fol.9. All our Lawe is guided by Use, and by Statute. And Pryot saith, fol.9. There cannot be a positive Law, but such as was iudged or made by Statute. Wherein I note also that hee equalleth a Iudgement with a Statute.*

In 36. *H.6. fol. 25. Fortescue* reasoneth thus ; *The Lawe is as I haue said, and so hath beene alwaies since the Lawe beganne.*

In 37. *H.6. f.22. Afcue* reasons thus ; *Such a Charter hath bin allowable in the time of our*

*Predecessours, which were as sage and learned as we be.*

In H.4.Edw. 4.fol.41. Markham reasoneth thus; It is good for vs to doe as it hath bin vsed before this time, and not to keepe one way one day for one party, and another day the contrary for the other party: And so the former *Precedents* be sufficient for vs to follow: And iudgement was giuen accordingly.

Anno 36.H.6.

And in the former Case 36.H.6. Forrescue saith further; Wee haue many Courses and Formes which be houlden for Lawe.

Also euerie one of these foure principall Courts, The Chauncery, Kings Bench, Common-plees, and Eschequer, haue in many things seuerall courses and formes which are obserued for Law, and that not onely in that proper Court, but also in all Courtes through the Realme; whereof many Examples bee remembered in the Case of the Mines in *Plowdens Commentaries*.

*In nouo caso nouum remedium.*

The third: But if there be no such for-

mer



mer Iudgements, nor direct Examples or Precedents, then this Rule hath a further extention, which is this.

There is a Rule in the common Lawe, that *in nouo casu nouum remedium est apponendum. Et concordent Clerici de Breue faciendo, ita quod nullus recedat à Cancellaria sine remedio.* For the Chancery is properly *Officina Iustitie & AEquitatis*; where all original writs (which in ancient times were the Grounds of all Suites) are deuised and framed. And these *Clerici* were graue and auncient men; skilfull, & long experienced in the course of the Chancerie; and called *Clerici de prima forma*: And of late time *Magistri Cancellariae*; who in new and strange cases, besides their owne knowledge and experience, had oftentimes conference with the graue Iudges for the deuising and framing of new Writtes when neede required. And this I take to bee the same which is in the Statute *W.2. cap.24. Et quotiescunq; de cætero euenerit in Cancellaria, quod in vno casu*

St. W. 2. ca. 24.  
Anno 13. Ed. 1.

reperi-

neperitur breue, & in consimili casu, cadere sub eodem iure & simili indigente remedio, non reperitur, Concordent Clerici de Cancellaria in breui faciendo, vel atterminent querentes in proximum Parliamentum. Et scribantur casus in quibus concordare non possunt, & referant eos ad proximum parliamentum : Et de consensu Iurisperitorum fiat Breue, ne contingat de cetero, quod Curia Regis deficiat conquirentibus in Iusticia perquirenda.

Wherein I note these three things: First, The Clerkes are to agree; and if they agree, that is an end, and standes for Lawe, and then no referrement to the Parliament. Second, If the Clerks agree not, and so the Case be referred to the Parliament; Then *De Consensu Iurisperitorum fiat Breue*. So *Consensus Iurisperitorum* is the Rule, and not the multitude of vulgar opinions. The third is, That Iustice faile not them which complaine: Which will often faile, if you stay vntill a Parliament: For Parliaments are not to be called for the wrong of a few priuate Subjects: but for

the great and vrgent affaires of the King and the Realme.

I finde also a like Rule in the Ciuile Lawe; *Vbi non est directa lex standum est arbitrio Iudicis, vel producendum ad similia.* And another saith, *De similibus ad similia iudicium & argumentatio recipiuntur.*

*Vbi non est directa Lex &c.*

4 Besides these, there is an other generall and certaine Rule in the Ciuile Lawe, which I referue to the last parte of that which I meane to speake in this Matter.

*Rex solus indicat, &c.*

So, leauing that vnto a more proper place, I will hereupon conclude, That if there bee no former Iudgements, nor Examples, nor Precedents to bee found, then *Concordia Clericorum, & Arbitrium Iudicum* is to seeke out the true and solide reason; and thereupon to ground their Iudgements in all new Cases: For it was truely saide by a learned Gentleman of the lower Houfe, *Deficiente lege recurrendum est ad consuetudinem: Deficiente consuetudine re-*

6



*currendum ad rationem*. And so from the Iudges we shall haue *Responsa prudentum* to decide all such new Cases and Questions. And according to this Rule, all such new doubts and questions haue beene resolued and decided by the graue Iudges in former times.

A request to  
the professors  
of the Ciuile  
Lawe.

But here, before I proceede further, I am to make a suite, which is this:

That whatsoever I haue spoken, or shall happen to speake of the Ciuile Lawe; or whatsoever I shall cite out of any Writer of that Law, I pray fauor of my Masters that professe it. I acknowledge that Lawe to be auncient and generall in many parts of the world; and I reuerence the professors of it, as men of great learning, wisdom, and iudgement. I professe it not; I haue learned little of it; but in that little I haue found that in the reall and essentiall partes of Iustice, the Ciuile and common Lawe doe in many things concur, though they differ much in the



forme and manner of proceeding. And that which I shall haue occasion to produce of that Lawe, will bee to shew how the common Law and Ciuile doe agree in one reason and iudgement in those things which I shall speake of.

Yet I must take libertie to say, That neither in *Spaine*, nor in *France* (those two great Monarchies) it is not generally receiued nor allowed as a concluding and binding Law.

They take there the reason of it onelie as a directiō to their proceeding & iudgement: But to produce or alleadge it as a concluding or binding Law, was no lesse than *Capitis pœna*.

This I make not of my selfe; for, besides common practise and experience, I haue an honest and substantiall witnesse, Master *Adam Blacwood* a Scottishman, a man of singular learning in the Ciuile Lawe, who defendeth in like manner the Lawes of *Scotland*, as appeareth in his learned Booke intituled, *Pro Regibus Apo-*

*Blacwood ca. 10*

logia, written by him against a seditious Dialogue or Libell made by George Buchanan, *De iure regni apud Scotos*, where he tells him, *Aliud Sceptrum, aliud Plectrum*. But it is not amisse to recite his owne words, which are thus; *Philippus cognomento Pulcher, cum Lutetiae supremæ iurisdictionis curiam institueret, eam Romano iure solutam esse declaravit: in eamq<sup>3</sup> sententiam vetus extat eius Curia decretum, ne causarum patroni Romanarum Legum auctoritatem patriæ legibus opponant. Sed cum illæ bono & equo niti videntur & probabilem utilitatis publicæ causam continere, nos earum utimur haud imperio, sed ratione cui omnes homines naturæ præscripto subijciuntur. Quin etsi quid aduersus rationem legum Romanarum perperam ac temerè iudicatum est, id earum multis pœnis haud æstimatur, sed vel Principis, vel superioris magistratus arbitratu. Nam cum in publici muneris partem admittimur, & conceptis verbis inauguramur, solemni sacramento regiarum & municipalium legum atq<sup>3</sup> morum obseruationem, nulla Romani iuris mentione, spondemus. Apud Hispanos*

*capitis pœnam ijs indictam legimus qui Romanarum legum auctoritatem vel in foro laudarent, vel in puluere scholastico profiterentur. Sed si quid occurreret patrijs legibus ac moribus indefinitum quod iudicanti religionem adferret, vnicum erat eximendo scrupulo regis consulendi remedium. Alaricus Tolosa regnans, idem Gothis imperauit, vt si quis aduersus ipsius leges, Ciuile Romanorum ius citaret, temerè factum morte lueretur.*

*Recurrend. ad  
Rationem &c.*

Now to returne to that which I haue touched before, I say, that when there is no direct Lawe, nor precise Example, we must *Recurrere ad rationē, & ad responsa prudentum*. For, although *Quod non lego, non credo*, may bee a true and certaine rule in Diuinitie; yet for interpretation of Lawes, it is not alweies so: For wee must distinguish betweene *fidem moralem*, and *fidem diuinam*, or else wee shall confound many things in the ciuile and politike gouernment of Kingdomes and States. For, the first Precedent which wee haue now, had no precedent when it began; But as *Taci-*

*Quod non lego  
non credo.*

*tus saith, Quæ nunc vetustissima creduntur noua fuerunt, & quod hodie exemplis tuemur, inter exempla futurum est.* And to those that hould, that nothing is to bee done but by former Examples, *Horace* speaketh thus; *O imitatores seruum pecus:* And *Cicero* saith, *Non exempla maiorum querenda, sed consilium est eorum à quibus exempla nata sunt explicandum.*

Thus hath Iustice beene duely administered in *England*, and thereby the Kings haue ruled, the people haue beene gouerned, and the Kingdome hath flourished for many hundred yeeres; and then no such busie Questionists moued any quarrell against it.

Exposition  
of Statutes.

Thus haue all doubts growing vpon *Magna Charta*, and *Charta de Foresta*, made in King *Henry* the thirds time, and vpon the Statutes of *Westmin.1. Westm.2. Westm.3.* and many other Statutes made in *Ed.1.* time: And vpon *Prærogatiua Regis*, and many other Statutes made in *Ed.2.* time, beene from time to time ex-

poun-



pounded; and so of later times, the Statutes of Fines, of Vses, of Willes, and many more.

Thus also haue all Doubts and Cases, whereof there was no Statute or Positiue Lawe, beene alwaies expounded: for such are most of the cases which wee haue in our Yeere-Bookes, and Bookes of Reports, which are in effect nothing but *Responsa prudentum*, as Iustice Crooke did truly say.

Vpon this reason it is, that some lawes, as well Statute Lawe, as common Law, are obsolete and worne out of vse: for, all humane lawes are but *Leges temporis*: And the wisdom of the Iudges found them to bee vnmeet for the time they liued in, although very good and necessarie for the time wherein they were made. And therefore it is saide, *Leges humana nascuntur, vigent, & moriuntur, & habent ortum, statum, & occasum*.

By this Rule also, and vpon this reason it is, that oftentimes auncient Lawes are

Exposition  
of Lawes.

Lawes ob-  
solete.

Lawes chan-  
ged.

changed

changed by interpretation of the Iudges, as well in Cases criminall as ciuile.

In criminall cases the Law was *Voluntas reputabitur pro facto* ; but it is not so now, sauing in treason onely.

In an appeale of Maime *Britton fol. 48.* saith, *Soit le Iudgement, que il perde autiel member, come il auer tolle a le plaintife* ; but it is not so now.

In auncient time, one present, aiding, comforting, and assisting to a murder, was taken to bee no principall, but an accessorie, as it appeareth *M.40. Edw.3. fol. 42. & 40. li. Ass. p.8. & p.25.* But now in that case hee is iudged a principall. And so it was ruled by all the Iustices *M.4.H.7. 18.* and so *Plowden* affirmeth the Lawe to be, in his *Commentaries fol.99. & 100.*

In ciuile causes in auncient time, the Lawe was houlden, That hee in Remainder in Taile could not haue an action of Waste, nor bee receiued vpon default of tenant for life : But afterwards, the Lawe was often iudged otherwise ; and so is

the common experience and practise at this day.

In *Anno 40. Ed. 3. 28. Fynchden*, chiefe Justice of the common place, saith, that in ancient time the Vicar could not haue an Action against the Parson; But hee saith the contrarie is vsed at this day, which is the better.

In ancient time a Disseisee could not enter vpon the feoffee of the Disseisor, for sauing of the warrantie; but for many yeeres the Lawe hath beene houlden otherwise, and so the common practise yet remaineth.

By this Rule it is also, that words are taken and construed, sometimes by Extension; sometimes by Restriction; sometimes by Implication; sometimes a Disiunctiue for a Copulatiue; a Copulatiue for a Disiunctiue; the present tense for the future; the future for the present; sometimes by equity out of the reach of the wordes; sometime words taken in a contrary sence; sometime figuratiuely, as *Continens pro con-*

Construction  
of words,

Judges con-  
sulted with  
the priue  
Counsell,

39.Ed.3.li.AC  
P.1.

tento, and many other like : And of all these, examples be infinite, aswell in the Ciuile lawe as Common lawe.

And oftentimes the reuerend Iudges haue had such a graue regard in their proceeding, that before they would resoluē, or giue iudgement in such new cases, they desired to consult with the Kinges priue Counsell ; as appeares in diuerse cases in king *Ed.3.* his time.

*R. W.* assaulted *Adam Brabson* in presence of the Iustices of Assise at *Winchester*, for which *A. B.* complained by Bill before the saide Iustices, alledging this offence to bee in despite of the King and his Iustices, to his dammage of an hundred pounds. *R. W.* pleaded, Not guiltie ; and was found guiltie, and dammages taxed to tenne pounds. Thereupon the Iudges awarded him to prison in the Sherifes keeping. And for the Fine, and that which should be further done for the King, for the assault done in the presence of the Iudges, they would haue the ad-

uise



uise of the Kings Counsell : For in a like case, because R. C. did strike a Iurour at *Westminster*, which passed in an Enquest against one of his friends, It was adiudged by all the Counsell, that his right hand should be cut off; and his lands and goodes forfeited to the King. These bee the words in the Booke.

*M. 19. Ed. 3.*  
Iudgemēt 174

In this case I note three things.

1. The Iudges consulted with the Counsell.

2. They had a like Case before when the Counsell was also consulted with, viz. *An. 19. E. 3.* and yet they would not proceede in this case before they had againe consulted with the Counsell.

3. That before *Anno 19. Ed. 3.* there was no like case nor precedent for such a Iudgement ; And therefore the Iudges would not of themselues pronounce that heauy Iudgement before they had conferred with the Counsell touching the same. And after they had the opinion

and aduise of the Kinges Counsell, they proceeded to that Iudgement.

M.39.Ed.3.35

*Thomas Vghtred Knight*, brought a *Forme-done* against a poore man and his wife; They came and yeelded to the Demaundant, which seemed suspitious to the Court: whereupon they examined the Matter, and staied Iudgement, because it was suspitious. And *Thorpe* saied, that in the like Case of *Giles Blacket* it was spoken of in Parliament: And wee were commaunded, that when any like Case should come, we should not go to iudgement without good aduise. Wherefore sue to the Counsell, and as they will haue vs to doe, wee will; and otherwise not, in this Case.

M.40.Ed.3.34

*Greene* and *Thorpe* were sent by the Iudges to the Kings Counsel (where there were 24. Bishops and Earles) to demand of them, whether by the Statute 14.Ed.3. ca.6. a word may be amended in a Writ,

has

aswell

aswel as a letter or a sillable: for, the statute speakes but of a letter or a sillable; & it was answered, That it may well be amended; For, there can not bee a Word without a Sillable; and that it was a nice Question of so sage men.

Thus *Arbitria Iudicum*, and *Responsa prudentum* haue beene receiued, allowed, and reuerenced in all times as Positiue Lawe; and so it must be still; For, otherwise much mischiefe and great inconuenience will ensue: for new cases happen euery day: No lawe euer was, or euer can be made that can prouide remedie for all future cases; or cōprehend all circumstances of humane actions which Iudges are to determine: Therefore, when such happen, and complaint is made; what shall Iudges doe? Shall they giue no remedie to the partie griued? Shall they stay for a Parliament? *Interim patitur iustus*. They must therefore follow *Dictamen rationis*; and so giue speedie iustice. And in ma-

Iudges to be directed by reason and discretion.



ny matters of materiall circumstances they must guide themselves by discretion.

As in iudging vpon Presumptions; To discerne which be *Presumptiones temerarie*, which *Probabiles*, which *Violente*.

So for Time ; what is a conuenient Time, and what not.

So for Waste ; what is Waste punishable, and what not.

So for Tenders of money ; what is a conuenient place for tender of mony, and what not : and what is a lawfull Tender, and what not.

So for Disparagement ; what is a disparagement, and what not : And so of other the like cases, which are infinite.

*Obiect.*

That the common Lawe is vncerten.

If it be said (for so some haue said) That if this be thus, then the common Lawe of *England* is vncerten ; and so the rule of Iustice, by which the people are gouerned, is too pliable, and too weake, and vncerten.



Respons.

By the same reason it may be said; That all the Lawes of all nations are vncerten: For, in the Ciuile Lawe, which is taken to be the most vniuersall and generall Lawe in the world, they hould the same rule and order in all cases which be out of the direct words of the Lawe; and such cases bee infinite: For, as I saied, new cases spring euery day as malice and fraude increaseth. And since the Roman Empire beganne, most of their Lawes be either *Edicta Principum*, or *Arbitria Iudicum*, or *Responsa prudentum*. And in their Iudgements they are guided by Arrests and former Iudgements, as may appeare in the books of many that haue collected such Arrests. And they attribute so much to such former Iudgements, That as *Prysot* equalleth them to a Positiue Lawe, so they hould, That *Sententia facit Ius, & res iudicata pro veritate accipitur, & legis interpretatio legis vim obtinet.*

Nay (which is more vncerten) sometimes they relie vpon Doctours opinions

deliue-

deliuered in their Prelections and Treatises. And when they findethem varying, and differing one from another (as sometimes they doe) then they preferre that which is *Communior opinio*: And so in good reason they may: For, *Pluralitas idem sentientium semper superat; quia facilius inuenitur quod à pluribus queritur.*

But to conclude this point, I would aske of these Nouelists, what they would haue done in *Sibill Belknappes* case, if they had liued in *Henry* the fourth time?

M. 3. H. 4. 7.

Sir *Robert Belknappe*, that reuerend and learned Iudge, of whome sundrie noble and worthie persons, and some now of great & eminent place in *England* are descended, was banished out of the Realme, (*Relegatus in Vasconiam,*) not for any desert or offence of his, but by the might of his potent enemies, and malice of the time. The Lady his wife continued in *England*; she was wronged; she brought a Writ in her owne Name alone, not naming her Husband. Exception was taken against

-enilob

it,

it, because her husband was liuing ; and it was adiudged good, and shee recouered : and the Iudge *Markeham* said;

*Ecce modo mirū quòd fœmina fert breue regis,  
Non nominando virum coniunctū robore legis.*

Here was a rare and a new case, yet it was not deferred vntill a Parliament : it was iudged, and her wrong was righted by the common Law of *England*, and that *Ex arbitrio Iudicum, & ex responsis prudentum*; and yet it was counted *Mirum* with an *Ecce*.

Now to apply this to *R. Caluines* case : his case is rare and new, so was that : There is no direct Law for him in precise and expresse tearmes : There was neuer iudgement before touching any borne in *Scotland*, since King *Iames* beganne his happie raigne in *England* : Hee is the first that is brought in question : So there was no direct Lawe for *Sibill Belknap* to sue in her owne name without her husband, who

was then liuing : nay rather there was direct Lawe against it ; yet by the Lawe of *England* shee had iudgement to recouer with an *Ecce modo mirum* : So by the lawe of *England* iudgement ought to bee giuen for *Robert Caluine*, but not with an *Ecce modo mirum* ; but vpon strong Arguments deduced à *similibus*, and *ex dictamine rationis*.

But before I come to those arguments, I wil vse a few words more touching some Rules which I haue read for the interpretation of lawes.

Note foure  
formes of in-  
terpretation  
of Lawes.

There is a graue and learned Writer in the Ciuile Lawe that setteth downe foure waies & formes of interpretation of lawes: that is, first, *Interpretatio historica* ; secondly, *Etymologica* ; thirdly, *Analogica* ; fourthly, *Practica*.

In the Argument of this Case all these formes haue beene vsed, and largely handled : and the two first be those that seeme but light to me, and therefore in mine o-

pinion



pinion haue beene too much stooode vpon,  
and ouer-weighed.

For the Historicall interpretation, it  
is alwaies darke, obscure, and vncerten, of  
what kingdome, countrey, or place soeuer  
you speake; I doe alwaies and onely ex-  
cept the diuine Histories written in the  
Bible.

*Historica.*

*Liuy saith, In tanta rerum vetustate multi  
temporis errores implicantur.*

Saint *Augustine* speaking of the suppo-  
sed Bookes of *Henoch* saith, *Libri isti ob  
nimiam antiquitatem reijciuntur.*

Wherefore, for this parte let this suf-  
fice, whether in the beginning there were  
one or seuerall Kingdomes in great *Brit-  
taine*; or one or seuerall Monarches and  
Kings of these two great & famous King-  
domes in great *Britaine*. The King our So-  
ueraigne is lawfully and lineally descen-  
ded of the first great Monarchs and Kings  
of both the Kingdomes; and that by so  
long a continued line of lawfull discent, as

*Fergus.  
Inas,*

therein he exceedeth all the Kings that the world now knoweth ; and therefore to inquire further of Historicall knowledge in this Case, I hold it needelesse.

*Etymologica*

For the Etymologicall interpretation, there hath beene very much saied, euen as much as Wit and Art could deuise: There haue beene alleadged manie Definitions, Descriptions, Distinctions, Differences, Diuisions, Subdiuisions, Allusion of wordes, Extension of wordes, Construction of words ; and nothing left vnsearched to finde what is *Ligeantia*, *Allegiantia*, *Fides*, *Obedientia*, *Subiectio*, *Subditi* ; And who bee *Aborigines*, *Indigenæ*, *Alienigenæ*, *Aduenticij*, *Demizati*, &c. And much of this hath beene drawne out of some Writers of the Ciuile Lawe ; amongst whome the Etymologicall interpretation of the words *Ligeus*, and *Ligeantia*, is as vncerten and doubtfull, as it is with our common Lawyers ; And so vpon any of these there cannot be any certen Rule found for Iud-

ges to iudge by, especially in new and rare Cases.

As for Definition, *Vlpian* teacheth vs, *Omnis definitio in iure Ciuili est periculosa*. and it is said, that *Definitio est duplex: Propria, quæ constat ex genere, & differentia: Impropria, quæ & descriptio vocatur, & est qualibet rei designatio*: So Definition and Description are often confounded, and both vncerten. Then, since both be vncerten and dangerous, I will leaue both, and seeke a more certen Rule to iudge by.

As for Etymologie of words, I agree with him which saieth, It is *Leuis & fallax, & plerumque ridicula*. It is a Pedant Grammarians fault. *Marcus Varro* and others haue beene noted for it. And if you examine the Examples which some doe bring, you will perceiue how ridiculous and vaine it is. So this Rule will not serue to finde out that which wee seeke for: These bee but *Tendicula verborum, & Aucupationes syllabarum* as one calleth them: It may haue some vse, and

serue a turne in Schooles, but it is too light for iudgements in Lawe, and for the seates of Iustice.

*Aquinas* setteth downe a more certen Rule, *In vocibus videndum, non tam à quo, quàm ad quid sumantur.* And words should be taken *Sensu currenti*: for Vse & Custome is the best *Expositor* both of Lawes and Wordes, *Quem penes arbitrium & ius & norma loquendi.*

Wherefore, of the many and diuerse distinctions, diuisions, and subdivisions, that haue beene made in this Case, I will say no more but, *Confusum est quicquid in puluerem sectum est*: and will conclude with Bishop Iuel; *A man may wander and misse his way in Mists of Distinctions.*

*Ligeantia sensu currenti est vinculum fidei &c.*

Then leauing these Historicall and Etymologicall interpretations, and these curious and subtile Distinctions and Diuisions, I say, *Ligeantia*, or *Allegiantia* vnderstood *Sensu currenti*, is *vinculum fidei & obedientie*, as Iustice Daniel said well. And



hee that is borne in any of the Kings Dominions, and vnder the Kings obedience, is the Kings liege subiect, and borne *Ad fidem Regis* (for that is the proper and ancient word which the lawe of *England* hath vsed; *Ad fidem Regis Angliæ*, *Ad fidem Regis Franciæ*) and therefore hee cannot bee a Stranger or *Alien* to the King, or in any of his Kingdomes; and by consequence, is inhabled to haue lands in *England*, and to sue, and be sued in any Reall action for the same.

And *Ligeantia* hath sometimes a more large Extension: For, hee that is an *Alien* borne out of the kings Dominions, vnder the obedience of another king, if hee dwell in *England*, and be protected by the king and his Lawes, hee oweth to the king the duetie of *Allegeance*; and so hee is *Ligatus Regi*, and *Ligeus Regis*: and if hee commit treason, the Indictment shall bee *contra ligeantiam suam debitam*, as it was in *Shirley* the French-mans Case: yet is hee not the Kings subiect: for, hee was not borne

*Ad fidem Regis* ; But, this is not that Ligeance which wee must finde : For, in a true and lawfull subiect, there must bee *Subiectio*, *fides*, & *obedientia* ; and those cannot bee seuered, no more than true Faith and Charitie in a true Christian . And hee that hath these three *à natiuitate*, is *Ligeus Regis*, and can not bee a Stranger or *Alien* to the King, or in his Kingdomes . And that it is so, may be proued by the Rule of the other two interpretations of Lawe ; That is, *Analogica*, & *Practica*.

*Analogica.*

King *James* hath now the Kingdomes of *England*, *Scotland*, and *Ireland*, and the *Isles* of *Gernsey*, and *Iersey* by discent ; all these bee his Dominions, and vnder his subiection and obedience.

King *Henry* the second had *England* and *Normandy* by discent, from his mother *Mary* the Empresse; and *Aniow*, and *Maine* by discent from his father *Geffery Plantagenet*; and *Ireland* by conquest.

*Henry* the third had *England* and *Ireland*

by

by discent from his Grand-father *Henry* the second : and *Aquitany* by discent from his Grand-mother Queene *Elenor* wife to King *Henry* the second , and daughter to the duke of *Aquitany*.

*Edward* the first had all the same by discent ; and parte of *Scotland* by Conquest.

*Edward* the second , and *Edward* the third had all the same by discent also : and besides , *Edward* the third claimed all *France* by discent from his mother Queene *Isabell* , and had the most part of it in possession ; and so had *Henry* the fift and *Henry* the sixt also.

Now if in these kingstimes , subiectes borne in those Countries , being then vnder their obedience, vvere no *Aliens* , but capable of landes in *England* : And if at this time subiects borne in *Irelād*, or *Gernsey* , and *Iersey* be no *Aliens* , but capable of lands in *England* ; then, by an Analogicall interpretation , why should not subiectes borne in *Scotland* be at this time in like de-

*Practica: &  
sic ad similia.*

gree? For, in proportion, and in likenesse, and conueniencie, there can bee no difference at all.

But whether the subiects borne in those Countries in the time of those kings vvere then capable of lands in *England* as naturall subiects; or were deemed *Aliens*, is the Question: and therein *Interpretatio practica* is to bee considered; and so the Case is brought to be examined *per similia*. And in Diuinitie *Praxis sanctorum est interpretis praeceptorum*.

Now then the Question is, Whether the kings Subiects of *England* and *Scotland*, that be *Post-nati*, may be resembled to the King's subiects of *Ireland*, and the Isles of *Gernesey*, &c. as now they bee: and to the subiectes of *Normandie*, *Aniow*, and *Gascoyne*, and parte of *Scotland* in former times, when the same were the Dominions, and vnder the obedience of the King of *England*: (for I speake alwaies, and would be vnderstoode of kingdomes and



dominions in possession, and vnder obedience, and not of those whereunto the King hath right, but hath no possession or obedience.) I houlde, that in all points materiall concerning this Question they are alike, though not in all things: (for, then it were *Idem*, and not *Simile* :) and this can not bee better vnderstoode, than by examining the Obiections to the contrary: which in substance may bee reduced to foure in number.

First for *Ireland*, it was gotten by Conquest, and the Conquerour may impose what Lawes hee will vpon them: But it is otherwise of kingdomes comming by descent.

*Ireland:*  
*Obiect. 1.*

This is a conceived difference, and lacks the foundation of Reason, and hath not the true parts of a difference: for those that are borne in *Ireland*, and those that are borne in *Scotland*, are all alike for their birth within the Kings Dominions, and

*Respons.*

are borne vnder the like subiection and obedience to the King, and haue the like bond; Nay, euen the same bond of *Alliance*; That is, they are borne *Ad fidem Regis*.

Besides, where it is said, The Conquerour may impose what Lawes hee will: Then consider how it was in the *Interim* before King *Iohn* gaue lawes to *Ireland*.

Nay, which is more, I aske whether the Conquerour of *Ireland* can giue new lawes to *England*, and make Irish men to bee as naturall borne subiectes in *England* (if their birth-right doe not giue it them) which before the Conquest they were not? for, that is properly the Question: But if any difference bee, the Case of descent is the stronger: For, (as Iustice *Yeluer-ton* saide) that is by an vndoubted Title made by lawe; the other by a doubtfull Title wonne by the Sword.

France.

But leaue *Ireland* gotten by Conquest; vwhat say you to the great kingdome of

France;

*France* ; which *Edward* the third had first in right by lawfull descent, and after in possession by triumphant Conquest ; and vvhich *Henry* the sixt held after in possession by descent? Was euer doubt made, Whether the subiects borne there so long as it vvas in subiection and obedience to the King, vv ere capable of landes in *England*?

I vvill now turne the Case, and aske an other Question ; If King *Iames* our Soueraigne had first beene King of *England* by lavvfull descent (as novv hee is) and after *Scotland* had descended vnto him, should not the Subiects of *Scotland* ( I speake still of *Post-nati*) haue beene iudged as Natural subiects in *England*, as those of *France* were in *Edward* the thirds time?

Then, he hauing now both kingdomes by lineall, true, and lavvfull descent, it can make no difference touching the capacitie of Subiects, vvhich kingdome descended to him first, and vvhich second ; but both are to him alike. And it is cleere,

§

*Post-nati* in *England* are now capable and inheritable in *Scotland*, though some haue made a causelesse and needelesse doubt of it : and so on the other side those of *Scotland* are in *England*.

Normandy  
and Aquitany.  
*Obiect. 2.*

It is said, *Normandie* and *Aquitanie* were no monarchies or kingdomes, but dukedomes or seigniories in *France*, and holden of the Crowne of *France*, and therefore not to bee resembled to *Scotland*, which is an ancient and absolute kingdome.

*Respons.*

This Obiection reacheth not to the reason of our Question : For, bee they kingdomes, bee they Seigniories, yet the subiectes borne there, were borne out of the kingdome of *England*, and so in that respect Aliens : But in that they were borne within the kings dominions, and vnder his subiection and obedience, they were no Aliens but liege and naturall borne subiectes to the King; and so capable and inheritable in *England*.



I say besides, the Dukes of *Normandie* and *Aquitany* were absolute Princes, and had soueraigne power in those countries, although they did not beare the name of kings; as at this time the Duke of *Sauoy*; the duke of *Florence*; the Duke and State of *Venice*; and of late, the great Duke of *Russia*; the Duke of *Burgundy*; the Archduke of *Austria*, &c.

So the difference in Stile and Name makes no difference in Soueraignty: For, king *Henry* the eight had as absolute soueraignetic in *Ireland*, vwhen his Stile was Lord of *Ireland*, as when hee changed his Stile, and was called, *King of Ireland*.

And, to say, That the tenure of the Crowne of *Fraunce* should giue any priuiledge to them of *Normandie* and *Aquitanie* in *England* is a strange conceipt; It might rather bee objected against them. But, as I saied before, they were borne within the kings Dominions, and vnder his obedience, and therefore as subiects borne in *England*.

And

And if men may beleue some auncient Stories, *Aquitany* and *Normandy* had sometimes kings, and were kingdoms of themselves : and not depending nor subiect to the Crowne of *France*: and the kingdome of *France* was then a small portion of *Gallia*, and but a little one, in comparison of that which it is at this day. And some say, that there were foure and twentie kings in *Gaule*: But as the kings of *France* increased in power and strength, they subdued their neighbor-Princes, and so that kingdome grew to that greatnesse that nowv it is at; euen as the *Heptarchie* in *England* was dissolued, and made an intire kingdome, when one of the kings mightier than the rest subdued his neighbors.

The Crowne  
and great seale  
of England.  
*Obiect. 3.*

It is saied further, that *Normandy* and *Aquitany* were subiects to the Crowne of *England*; and to the great Seale of *England*; but so is not *Scotland*: Ergo &c.

*Respons.*

This standeth not wel with that which

but A

was

was objected before ; That they were but Seigniories houlden of the Crowne of *Fraunce*. And it is true, that before *Edward* the thirds time, those Kings of *England* that held those great Seigniories, did acknowledge, that they held the same of the Crowne of *Fraunce*.

But these Obiections be light, and not worth the time that hath beene spent about them. The Soueraignetie is in the person of the King ; the Crowne is but an Ensigne of Soueraignety ; the Inuesture and Coronation are but Ceremonies of honour, and maiestie : the King is an absolute and perfect king before he be crowned, and without those Ceremonies.

The Seale is to be altered and changed at the will and pleasure of the King : hee may haue one, hee may haue many, as pleaseth him. The King did vse Queene *Elizabeths* Seale, for diuerse moneths after his comming into *England* : Queene *Elizabeth* vsed king *Philips* & queene *Maries* Seale for a time ; and queene *Marie* v-

fed king *Edwards* seale. And all that vvas  
so done, was well and lawfully done. Ma-  
ny things were done by auncient kings of  
*England* before the Conquest by their sig-  
nature, and signe manuell without anie  
seale at all; and some such since the Con-  
quest also: as Graunts made by *Maude* the  
Empresse to *Albericke de Vere*, and others.

The King may by his great seale com-  
maund all his subiectes that bee vnder his  
obedience wheresoeuer they bee in the  
world: So he did in *Normandie*; so he did  
in *Aquitany*; so hee did in that part of *Scot-*  
*land* that he had in possession. And in 24.  
*Edw. 1.* his Iudges kept ordinary Courts  
of iustice there: and I haue seen the Re-  
cords of *Placita Exercitus Regis apud Edin-*  
*burgh, Apud Roxburgh, Apud S. Iohns-towne,*  
*&c. in Scotia.* So hee may commaund his  
subiects, if they be in *France, Spaine, Rome,*  
or *Turkie*, or the *Indies*. And for leuerall  
seales, the Earle of *Chester* had a speciall  
seale for that his auncient County *Palatine*.  
The Duke of *Lancaster* had a speciall seale



for his new Countie *Palatine*. And after, when these Counties came to the kinges possession, the Kinges continued severall seales in them both for the administration of iustice; but as subordinate to the great Seale of *England*.

And I make little doubt, but if the King shall now commaund any of his subiects of *Scotland* vnder his great seale of *England*, they will (as they ought) duetifully obey him. As in king *Edward* the 1. *Edward* the 2. and *Edward* the 3. times they commanded many of the Lordes of that parte of *Scotland* which then was vnder their obedience.

I finde, that in 13. *Edw. 2. quarto die Iunij*, the King *Constituit Adomarū de Valentia commitem Pēbrochie Custodem Regni sui; ac locum suum tenentē quamdiu Rex in partibus transmarinis morā fecerit*. And the next day, viz. *Die Iouis quinto die Iunij Rex ordinavit, quod magnum Sigillum suum remaneret clausum in aliquo loco securo, dum Rex esset in partibus*

*transmarinis* : Et ordinavit quoddam aliud paruum Sigillum interim pro regimine Regni, ad brevia, &c. Consignanda, sub Teste Adomari de Valentia Comitis Pembroch. Nota, heere was a petty Seale pro regimine Regni, wherein are compriled Commissions for Iustice, Mandatoria, & ad brevia consignanda; which is for Remedialia as they are termed.

General Laws,  
Object. 4.

It is saide, that Scotland hath Lawes that are proper for that kingdome, & that they are not subiect to the lawes of England, and so è contra.

And lastly it was saide, that in England euery person was within the iurisdiction of some Leete, and at the age of twelue yeares euery one is to bee sworne in the Leete to bee Foiall and Loiall to the King of England; That is, to the Lawes of England, (for so hee vnderstoode Loiall:) But *Post-nati* in Scotland can not be so; and that they haue an other forme of oathe in Scotland: Ergo, &c.

Respons.

For this last parte, of the Oathe in the Leete, the Lord chiefe Barondid cleere it to plainely, as more needes not to be said. This is *Legalis ligeantia*, It is not *Alta ligeantia* by birth, which is that which we haue now in question.

The Historicall discourse that hath bin made of Leetes, of Law-dayes, of *Decenna*, *Decennarij*, of the Tenne-mens Tale, and the Oathe of all Male children of twelue yeeres, &c. taken at the Leete, is no newes indeede, it is very olde.

Master *Lambard* hath it all, and more too, at large in *Explicatione verborum* in the word *Centuria*; It vvas before the Conquest.

*Lambard in explicatione verbi Centuria.*

But it maketh nothing to this naturall Allegiance and subiection of birth; it is not *Alta ligeantia* by birth-right; it is but *Legalis ligeantia* by Policie: And *Fitzherbert* calleth it *Swearing to the Lawe*.

And if that were the onely Bond and Marke of Allegiance, many are out of it, and so at libertie. As, children vnder

twelve yeeres; yet sometimes they may commit treason and felony; where, *Mali-  
tia supplet etatem*. So women of all sortes; yet they may bee shrewd and dangerous traitours; and if they bee women nobly borne, or widowes that were wiues to noble men, they shall be tried *per pares*.

” Also Noble men of all sortes, who are neither bound to attend the Leete, nor to take that Oath, as appeereth by *Britton cap. 29.* treating of the Court called *The Shirifes Turne*, out of which the Leete seemeth to be extracted: For, whatsoeuer is not presented in the Leete may bee presented and punished in the *Shirifs Turne*. And *M. Kitchin* citeth *Britton* in this point for the Leete; and alleadgeth also the statute of *Marlebridge cap. 10.* to the same purpose.

And at this day the view of Franck-pleges, and the putting in of Franck-pleges, and the *Decennarij*, are but bare names of things past, the vse and substance is obsolete and gone.



And, as it was saide, few in this place haue put in such Pleges, or taken that Oath, and yet I trust wee are good subiects, and beare true faith and allegiance.

But this hath beene so fully answered and cleered by the Lord chiefe Baron, and the Lord *Coke*, chiefe Iustice of the Common pleas, as I doe wrong to spend time in it.

But touching the seuerall Lawes; I say, that seuerall lawes can make no difference in matter of Soueraigntie; and in the bond of *Allegeance* and obedience to one King: And so it concludeth nothing for the point in question.

*Normandy* and *Aquitany* had seuerall lawes differing from the lawes of *England*: so had *Fraunce* in King *Edward* the 3. and *Henry* the 6. his time.

*Ireland*, before king *Iohns* time continued their auncient Lawes, and so, for the most part, haue done euer since.

*Gernesey* and *Jersey* haue yet at this day

seuerall lawes, which, for the most part, were the auncient Lawes and Customes of *Normandie*.

*Wales* had, & in many things yet haue seuerall Lawes: so for the County Palatine of *Chester* also.

Yet these neuer were, nor must not be cancelled and cut off from their allegiance and obedience to the King; nor the Kings subiects borne there be incapable of lands and inheritaunce in *England*: for vvhether there is but one Soueraigne, all his subiects borne in all his Dominions bee borne *Ad fidem Regis*; and are bound to him by one bond of Faith and Allegiance: And in that, one is not greater nor lesser than an other: nor one to bee preferred before another: but all to bee obedient alike; and to be ruled alike; yet vnder seuerall Lawes and Customes. And as Saint *Gregorie* sayeth of the Church, *In una fide nihil officit Ecclesie sancta diuersa consuetudo*. So I will conclude for this point, That diuersitie of Lawes and Customes makes no

breach of that vnirie of obedience, faith, and allegiance which all liege subiects owe to their liege King and Soueraigne Lord. And as none of them can be Aliens to the king, so none of them can bee Aliens or Strangers in any of his kingdomes or dominions; nor Aliens or strangers one to another, no more than a Kentish-man, to a Cheshire-man; or *e contra*.

And therefore all that haue bin borne in any of the kinges dominions since hee was King of *England*, are capable and inheritable in all his Dominions without exception.

And as to the other parte of the Obiection, that there will be defect of triall; for, things done in *Scotland*, cannot bee tried in *England*; I say, that that maketh little to our present Question, whether *Post-nati* in *Scotland*, be Aliens in *England*, and not capable of landes in *England*: but it trencheth to cast some aspersion vpon the common lawe of *England*; That

Defect of  
Triall.

it is not sufficient to giue iustice to the Kinges subiectes for lacke of sufficient meanes of triall of questions of fact : but to this baron *Altham* gaue so full an answer, as more cannot bee saied : And so hee did both cleare the doubt, and did vphould the sufficiencie of the lawe of *England* in that behalfe. And it seemeth strange, that this should now bee found out to bee obiected against *Scotland*, since it vvas neuer heeretofore obiected for *France*, *Normandie*, *Aquitany*, nor is at this day for *Ireland*, *Gernesey*, and *Iersey*, &c. whereas all stand vpon the same reason for the point of triall. But the wisdom of the lawe of *England* hath beene such, as there neuer failed certen rules for triall of all questions in fact ; and those were fitted and adapted to the Matter which was to bee tried. And therefore, whosoever doth diligently obserue it, hee shall finde in the course and practise of the lawes of *England* aboue twenty seuerall formes of trialls : as by Battell ; by Iurie, and that



in diuerſe kindes ; by Wager of Lawe ; by Prooſes ; by Examination ; by Inſpection ; by Certificates of diuerſe kindes ; and by manie other wayes : And leſt there ſhould bee any defect in that behalfe , the Law hath prouided ſeueral formes of *Ioyning of iſſues* ; and in that , hath ſpeciall regard of things done out of the Realme , as euerie Student may ſee in the Bookes of Reports.

Thus I haue paſſed theſe foure Obiections , and therefore for this part I conclude , That if *Argumentum à ſimili* were euer good and concludent in Lawe , my Lords the Iudges haue prooued this Caſe by ſo many plaine and direct Examples , and like Caſes ; and by ſo manie ſtrong arguments & ſolide reaſons drawne out of Booke Caſes , out of Statutes , out of the true rules and forme of pleading , and out of ancient Records and Precedents , ſome produced by M. Atturney , and many moe remembred by the Iudges , as no

*Recurrere ad  
Rationem.*

one thing can bee more plainly exemplified, nor appeare more like to an other, than this Case is to those Cases which they haue remembred.

But if examples and arguments à simili doe faile, then it remaineth *Recurrere ad Rationem*; and what reason that ought to bee, and how to bee vnderstoode, is to be considered: for, it is said, that *Lex est ratio summa, iubens ea quæ facienda sunt, & prohibens contraria*. So it must be the depth of reason, not the light and shallow dis-tempered reasons of common Discour-sers walking in Powles, or at Ordinaries, in their feasting and drinking, drowned with drinke, or blowne away with a whiffe of Tobacco. *Lucretius* noteth, that in many there is *Rationis egestas*: And saint Gregory saith, *Qui in factis Dei rationem non videt, infirmitatem suam considerans cur non videat, rationem videt*. For, although Reason and Knowledge bee infinite, yet no man can haue more of it than hee is capable of: Euery man must receiue it, and keepe it

in his owne vessell ; he cannot borrow his neighbours braine-pan to put it in . And therefore it is not without cause , that one of the grauest and best learned Lawyers of our age , and a priuie Counsellor to one of the greatest Monarches of *Europe* , describeth those that should bee Interpreters of Lawes by foure speciall qualities, That is, 1. *Aetate graues*, 2. *Eruditione praestantes* , 3. *Vsu rerum prudentes* , 4. *Publica auctoritate constituti*. So, there must be grauitie, there must be learning, there must be experience, and there must be authoritie : and if any one of these want, they are not to be allowed to be Interpreters of the Lawe.

How all these Qualities concur in these reuerend Iudges, whom wee haue heard in this present Case, I will spare to speake vvhhat I thinke : For, *Chrysostome* teacheth mee, *Qui laudatur in facie, flagellatur in corde*.

In seeking out this depth of Reason,

Hopperus de  
vera iuri prou-  
dencia pag. 118



Hopperwibld.  
pg. 119.

the same Author giueth a caution ; which is this ; *Vitium quod in hoc genere fugi debet est, ne, si Rationē non inuenias, mox legem sine ratione esse clames.* And in 36.H.6. Fortescue saith the same in effect, which is thus ; *We haue many Courses and Formes which bee houlden for Lawe, and haue beene houlden and vsed because of Reason ; and not withstanding the reason be not ready in memory, yet by study and labour a man may finde it.*

Now when wee come to examine by reason, whether *Post-nati* in Scotland shall be disabled as Aliens, or shall be capable of lands in *England*, as naturall borne subjects there ; wee are first to consider vwhat is the reason whie Aliens in the Dominions, and vnder the obedience of other forraine Princes, are nor capable of landes in *England*: And surely, the true reason is, that which was noted by baron *Altham* ; and hath since beene ofte remembred, *viz.* The danger that might thereby come to the king and the common-weale: Special-



ly by drawing hither too great multitudes of them : for so the Treasure of the Realme might bee transported by them into other forraine Kingdomes and Countries ; whereby it might bee vsed against the King, and to the preiudice of the State. And besides, they might vnder-hand practise Sedition and Rebellion in the kingdome, and cause many other daungers and inconueniences : but that reason cannot serue against *Post-nati* in *Scotland*, now that there is but one King of both the kingdomes, no more than it can serue against those that are borne in *Ireland*, or *Gernesey*, or *Iersey* : and therefore in reason they are as capable of landes in *England*, as the kings subiects of *Ireland*, and *Gernesey*, and *Iersey* are.

Against this, there haue also beene many Obiections made, and Reasons deuised that seeme witty, and haue some shew of probability to proue that *Post-nati* in *Scotland* are Aliens, and ought not in reason

*Obiections.*

to bee capable of landes in *England*, *videlicet*:

1. That *England* and *Scotland* were two ancient feuerall kingdomes vnder feuerall kings, and feuerall crownes.

2. That they continue yet feuerall kingdomes.

3. That they haue yet feuerall Lawes, feuerall Seales, feuerall Crownes, and feuerall Kings: For, it is said, though king *James* be king of both, and hath but one naturall body, yet in iudgement of Law, he is in respect of his two feuerall kingdomes, as two feuerall kings, and the subiects of ech feuerall kingdome are bound to him by distinct allegiance, according to the feuerall Lawes of the kingdome where they were borne.

And all this is grounded vpon this rule or fiction in Lawe: *Quando duo iura concurrunt in vna persona, equum est ac si essent in diuersis.*

And vpon this ground is this new form of pleading deuised, which the Defen-

dants

dants haue vsed in this Case, such as cannot be found in any Record, euer to haue beene pleaded before; and may as well serue against the Kinges subiectes of *Ireland*, as against the *Post-nati* of *Scotland*. And sithence in former times the like forme of pleading vvas neuer seene against any of the Kings of *Englandes* subiects, which were borne in any of his dominions out of *England*, as in *Normandie* or *Aquitanie*, or in *France* (I meane such part of it as was in the Kinges possession, and in subiection and obedience to him, and not in that parte of *France* which his enemies helde) it may be probably inferred, That it was then generally houlden, that neither such a forme of pleading, nor the Matter it selfe was sufficient in Lawe to disable anie such Plaintife: for, against French-men that vvere not vnder the Kings obedience wee finde it often pleaded. And as those that were not subiects to the King, nor borne vnder his obedience, did then presume to bring suites,

and actions in *England*. So it can not bee thought, but that the king hauing then so large and ample Dominions beyond the Seas, as *Normandy* and *Aquitany*, and many other partes of *France*, some of his subiects borne there, had cause to haue, and did bring the like suites in *England*. And sithence no such Plea is found to haue beene then vsed against them, it can not in Lawe and Reason bee now allowed against the *Post-nati* in *Scotland*: For, I may say as *Ascue* saied in 37. H.6. *Our Predecessors were as sage and learned as we be.*

And I see not, but that in this Case a good Argument may bee reasonably deduced from the Negatiue, as it was in the Case reported by the great learned, and most graue and reuerend Iudge sir *James Dyer* chiefe Iustice of the Common pleas, *Anno 23. Elizab.* The Question there, was, Whether an erroneous iudgement giuen in *Rie*, which is a member of the Cinque-portes, might bee reuerfed in the kinges Bench, or Common place at Westmin-

P. 23. *Elizab.*  
*Dyer.* 376.

ster;



ster ; And it was thus resolved ; *Sed pro eo quod nullū tale breue in Registro, nec in aliquibus Præcedentibus curiarum prædictarū inueniri potuerat, dominus Cancellarius Bromley per opinionem Capitalium Iusticiariorum vtriusque Banci denegauit tale breue concedere.* And so Iustice Fenners argument houldeth well, *viz.* There is in this Case no lawe to exclude the Complainant, *Ergo* hee is a liege and a naturall borne subiect.

But the forme of pleading in the time of king *Ed.1.* in *Cobledickes* case, which was cited out of *Hengam*, (and the Booke shewed heere by the Lord chiefe Iustice *Coke*) is so direct and plaine for this our Question, as nothing can be more plaine and therefore I thinke it not amisse to report it againe.

That Case was in effect and substaunce, thus :

A woman brought a Writte of *Ayel* against *Roger Cobledicke*, and declared of the seisin of *Roger* her Grand-father, and conueied the discent to *Gilbert* her father;

and from him to the Demaundant, as his daughter and heire. The Tenant pleaded, that the Demaundant was a French-woman, and not of the ligeance nor of the fidelitie of *England*; and demaunded iudgement if shee ought to haue the action against him. This plea vvas houlden to bee insufficient; and thereupon the tenant amended his plea, and pleaded further, That the Demaundant was not of the ligeance of *England*, nor of the fidelitie of the King; and demaunded iudgement, &c. And against that plea none exception was taken, but thereupon the Demaundant prayed licence to depart from her Writ. By this it appeareth plainly, that the first plea, alleadging that she was a French-woman, and not of the ligeance, nor of the fidelitie of *England*, was insufficient (and so declared by *Berreford* the chiefe Iustice;) For, there can bee no fidelitie nor allegiance due to *England*, respecting the land and soile without a Soueraigne and King. But the second Plea

alleadging,

alleging, that shee was not of the lige-  
ance of *England*, nor of the fidelitie of the  
King, was good and sufficient: For, to  
the King fidelitie and allegiance is due;  
and therefore, since shee failed in that, she  
was not to be answered: and thereupon she  
praied licence to departe from her Writte,  
and so she left her suite.

Now, for the reasons which haue beene  
drawne and strained out of the statute *An.*  
*14. Edw. 3.* if they bee well examined, they  
serue little for this point which we haue in  
hand.

It is to be considered, at what time, and  
vpon what occasion that Statute was made:  
King *Edw.* the third being right heire to  
the Crowne and Kingdome of *Fraunce* by  
descent from his Mother, and hauing  
spent many yeeres for the recouering of  
the same, resolved to take vpon him the  
Name and Stile of *King of France*; being  
aduised thereunto by them of *Flanders*:  
Hereupon he did take the Stile of *King of*

*Stat. 14. Ed. 3.*  
That the  
Realme of  
England shall  
not be subiect  
to France.

*Fraunce* ; and altered his Seale and his Armes ; and after a while, placed the Armes of *France* before the ancient Armes of *England*, as they are borne at this day. This gaue occasion for the making of this statute : for some people (*Ascungentes*, saith the statute) seeing this change, and considering the large and ample extent, and the magnificence of that great Kingdome, beganne to doubt that the king would make his Imperiall seate there ; and conceiued thereby, that the kingdome of *England*, being the lesser, should bee in subiection of the king and kingdome of *France*, being the greater, and to bee gouerned and ruled by a Vice-Roy, or Deputy, as they saw *Ireland* was. And though in the Kings Stile, *England* was placed before *France*, yet they sawe the Armes of *France* marshalled before the Armes of *England* ; though at the first bearing thereof some say it was not so.

To cleere this doubt, and to take away this feare from the Subiects of *England*,



was this Statute made, as doth plainly appeare by the wordes of the statute it selfe.

Now if you will make an apt and proper application of that Case then betweene *England* and *Fraunce*, to this our Case now, betweene *Scotland* and *England*, it must be thus:

1. *Edw. 3.* then king of *England* ( being the lesser ) had afterwarde the kingdome of *France* ( being the greater ) by descent, and tooke the Stile of *King of France*.

King *James* king of *Scotland* ( beeing the lesser ) hath afterward the kingdome of *England* ( being the greater ) by descent, and taketh the Stile of *King of England*.

2. King *Ed. 3.* altered his Seale, and his Armes, and placed the Armes of *Fraunce* before the Armes of *England*.

King *James* hath changed his Seale, and his Armes in *England*, and hath placed the

Armes of *England* before the Armes of *Scotland*.

3. It was then doubted, that King *Edw.* 3. would remoue his Court out of *England*, the lesser, and keepe his Imperiall seate and state in *France*, the greater.

King *James* hath indeede remooued his Court out of *Scotland*, the lesser, and doth in his royall person (with the Queene and Prince, and all his Children) keepe his Imperiall seate in *England*, the greater.

4. In all these the cases agree; but yet one difference there is, and that is in the Stile: For king *Ed.* 3. in his Stile placed *England*, the lesser, being his ancient kingdome, before *France*, the greater, being newly descended vnto him.

But King *James* in his Stile placeth *England*, the greater, though newly descended vnto him, before *Scotland*, the lesser, being his ancient kingdome.

5. Now

5. Now, this being thus ; perhappes *Scotland* might out of this Example haue conceiued the like doubt against *England*, as *England* did then against *France*: But as there was then no doubt made, whether the kings subiects borne in *England* should be capable of lands in *France*; so, out of this statute, and vpon this example no doubt can bee interred, whether the kings subiects now borne in *Scotland*, shall be capable of lands in *England*.

But, all these Obiections, and the ground whereupon they are framed, viz. *Quando duo iura &c.* haue beene so thoroughly and profoundly examined, and so learnedly and fully answered and cleared by the Iudges, as I make no doubt but all wise and indifferent hearers be well satisfied therein.

And if there bee any so possessed with a preiudicate opinion against Truth, and Reason, that will say in their owne heartes *licet persuaseris non persuadebis*; & so, either Serpent-like stop their eares, or else wil-

fully absent themselves, because they would not heare the weaknesse and absurdities of their owne conceits laied open and confuted: If there bee any such I say (as I trust there bee but few, and yet I feare there bee some) I would they had learned of *Tertullian*, That *Veritas docendo suadet, non suadendo docet*. And I wish that they bee not found among the number of those to whome Saint *Paul* saith, *Si quis ignorat, ignoret*: And Saint *Iohn* in the *Apocalips*, *Qui sordidus est, sordescat adhuc*. And I will exhort with Saint *Paul*. *Qui tenet, teneat*, and not wauer or doubt by such weake arguments and obiections.

A dangerous distinction betweene the King and the Crowne,

But in this new learning, there is one part of it so strange, and of so daungerous consequent, as I may not let it passe, *viz.* That the king is as a king diuided in himselfe; and so as two kings of two seuerall kingdomes; and that there be seuerall allegiances, and seuerall subiections due vnto him respectiue in regarde of his seue-

rall



rall kingdomes, the one not participating with the other.

This is a dangerous distinction betweene the King and the Crowne, and betweene the King and the kingdom: It reacheth too farre; I wish euery good subiect to beware of it. It was neuer taught, but either by traitours, as in *Spencers Bill* in *Edward* the seconds time (which Baron *Snig*, and the Lord chiefe Baron, and Lord *Coke* remembred) or by treasonable Papists, as *Harding* in his *Confutation of the Apologie* maintaineth, that Kings haue their authority by the positie Lawe of Nations, and haue no more power, than the People hath, of whome they take their temporall iurisdiction; and so *Ficlerus Simanca*, and others of that crew.

Or by seditious Sectaries and Puritans, as *Buchannon De Iure Regni apud Scotos*, *Penry*, *Knox*, and such like.

For, by these, and those that are their followers, and of their Faction, there is in

Absurdities in  
this dangerous  
distinction

their Pamphlets too much such traitorous  
seede sowne.

But leauing this, I will adde a little  
more, to prooue, that in reason *Robert Cal-  
uine*, and other-like *Post-nati* in *Scotland*,  
ought by Lawe to be capable of landes in  
*England*: and for that, I wil remember one  
rule more which is certen and faileth not,  
and ought to bee obserued in all Interpre-  
tation of Lawes; and that is, *Ne quid absur-  
dum, ne quid illusorium admittatur*.

But, vpon this subtile and dangerous  
Distinction of Faith and Allegiance due  
to the King, and of Faith and Allegiance  
due to the Crowne, and to the Kingdome  
(which is the onely Basis and fundamen-  
tall maine reason to disable the Plaintife,  
and all *Post-nati*) there follow too many  
grosse, and fowle absurdities, whereof I  
will touch some few, and so conclude, that  
in Lawe and Reason this subtile, but absurd  
and dangerous distinction, ought not to  
be allowed.

This

This Bond of Allegiance whereof wee dispute, is *Vinculum fidei*; it bindeth the soule and conscience of euery subiect seuerally and respectiue, to be faithfull and obedient to the King: and as a Soule or Conscience cannot bee framed by Policie; so Faith and Allegiance cannot bee framed by Policie, nor put into a politike bodie. An oath must be sworne by a naturall bodie; homage and fealtie must be done by a naturall bodie, a politike body cannot doe it.

Now then, since there is but one king, and soueraigne, to whome this faith and allegiance is due by all his subiects of *England* and *Scotland*, can any humane policie diuide this one King, and make him two kings? Can *cor Regis Anglie* be in *manu Domini*, and *cor Regis Scotie* not so? Can there bee warres betweene the King of *England*, and the king of *Scotland*? or betweene the kingdome of *England*, and the kingdome of *Scotland*, so long as there is but one king? Can the king of *England* now send

an army roial into *Scotland* against the king of *Scotland*? Can there bee any Letters of Marke or Reprisall now graunted by the king of *England*, against the subiects of the king of *Scotland*? Can there bee any Protections now, *Quia profecturus in exercitu Iacobi Regis Angliae in Scotiam*?

Nay shortly, Can any man bee a true subiect to King *James* as King of *England*, and a traitor or rebell to king *James* as king of *Scotland*? Shall a foote breadth, or an inch breadth of ground make a difference of birth-right of subiects borne vnder one king? Nay, where there are not any certen bounds or limites knowne at all, but an imaginarie partition wall, by a conceipted fiction in Lawe? It is enough to propound these and such like Questions, whereof many more might be remembred: they carry a sufficient and plaine answeare in themselues: *Magis docet qui prudenter interrogat.*

As the King nor his heart cannot bee



diuided, for hee is one entire King ouer all his subiectes, in which soeuer of his Kingdomes or Dominions they vvere borne, so hee must not bee serued nor obeyed by halues; hee must haue intire and perfect obedience of his subiects: for, *Ligentia* (as Baron *Heron* saied well) must haue foure qualities; It must bee 1. *Pura & simplex*: 2. *Integra & solida*: 3. *Vniuersalis non localis*: 4. *Permanens, continua, & illæsa*. Diuide a mans heart, and you lose both parts of it, and make no heart at all; so hee that is not an intire subiect, but halfe faced, is no subiect at all; and hee that is borne an intire and perfect subiect, ought by Reason and Lawe to haue all the freedoms, priuiledges, and benefites pertaining to his Birth-right in all the Kinges Dominions; and such are all the *Post-nati* in *England* and *Scotland*. And the inconuenience of this imaginary locall allegiance hath beene so lately, and so fully declared by the Lorde chiefe Iustice *Coke*, as more needes not bee saied in it.

In

In some speciall Cases there sometime may bee a king of subiects without land in possession, as Iustice *Fenner* noted in the gouvernement which *Moses* had ouer the people of *Israel* in the wildernesse; and as in the Case which sir *Iohn Popham* the late Lord chiefe Iustice did put in the Parliament: If a King and his subiects bee driuen out of his kingdome by his enemies, yet notwithstanding hee continueth still King ouer those subiects, and they are still bound vnto him by their bond of allegiance, whereloeuer hee and they bee: But there can not bee a King of land without subiects: For, that were but *Imperium in belluas*, and, *Rex & subditi sunt relativa*.

*Rex solus indicat &c.*

I saied there was an other generall rule for expounding of Lawes, which I reserved to bee last spoken of, I will now but touch it; for, I will not stand to examine by humane reasons, whether Kings were before Lawes, or Lawes before Kings; nor how Kings were first ordained; nor

whc-

whether the kings, or the people did first make Lawes ; nor the seuerall constitutions and frames of states and commonweales ; nor what *Plato* or *Aristotle* haue written of this argmmment.

They were men of singuler learning and wisdomē, but wee must consider the time, and the countrie in which they liued, and in all their great learning they lacked the true learning of the knowledge of God. They were borne and liued in *Greece*, and in popular States: they were enemies, or at least mislikers of all Monarchies ; yet one of them disdained not to bee a seruant or mercenarie hireling to a Monarch. They accompted all the world barbarous, but their owne Countrey of *Greece*: their opinions therefore are no Cannons to giue Lawes to kinges and kingdomes, no more than sir *Thomas Moores Vtopia*, or such Pamphlets as wee haue at euerie Martē.

I beleeeue him that saith, *Per me Reges regnant, & Principes iusta decernunt*; And

Prouca.8.

I make no doubt, but that as God ordained kings, and hath giuen Lawes to kings themselves, so hee hath authorized and giuen power to Kings to giue Lawes to their subiects; and so kings did first make lawes, and then ruled by their lawes, and altered and changed their Lawes from time to time, as they sawe occasion, for the good of themselves, and their subiects.

And this power they haue from God almighty; For, as Saint *Augustine* saith, *In hoc Reges Deo seruiunt sicut eis Diuinitus precipitur, in quantum sunt Reges; si in suo Regno bona iubeant, mala prohibeant, non solum quæ pertinent ad humanam societatem, Verum etiam quæ ad diuinam religionem.*

And I should *Thomas Aquinas* his opinion to be good, *Rex solutus à Legibus quòad vim coactiuam, subditus est legibus quòad vim directiuam propria voluntate.* And for this opinion there is a stronger authoritie, euen from God himselfe in *Ecclesiastes*, ca. 8. ver. 2. *Ego os Regis obseruo; Et præcepta iuramenti*



Der. & Ver. 4. Sermo illius potestate plenus est:  
Nec dicere ei quisquam potest, quare ita facis?

Now beeing led a little from the Common Lawe to the Ciuile Lawe, I finde in the ciuile Lawe a direct Text, warranting that generall Rule which I reserued to this place, which is this; *Inter æquitatem iusque interpositam interpretationem nobis solis & licet & oportet inspicere.*

*Cod. li. 1. Tit. 14  
lo. 1.*

And another like Text in these words, *Sententia Principis Ius dubium declarans, Ius facit quoad omnes.* And some graue and notable Writers in the ciuile Lawe say, *Rex est lex animata*: Some say, *Rex est lex loquens*: Some others say, *Interpretantur legem consuetudo & Princeps*: Another saith, *Rex solus iudicat de causa à iure non definita.*

*Ibidem le. 12.*

And as I may not forget Saint Augu-  
stines words, which are these; *Generale pa-  
ctum est societatis humanæ regibus suis obtempe-  
rare.* So I may not wrong the Iudges of the  
common Lawe of England so much as to

suffer an imputation to bee cast vpon them, That they, or the Common lawe doe not attribute as great power and authoritie to their Soueraignes the kinges of *England*, as the *Romane* lawes did to their Emperours: For, *Bracton* the chiefe Iustice in the time of king *Henry* the third, hath these direct wordes, *De Chartis Regijs & factis regum non debent nec possunt Iusticiarij nec priuatae personae disputare. Nec etiam, si in illa dubitatio oriatur, possunt eam interpretari. Et in dubijs & obscuris, vel si aliqua dictio duos contineat intellectus, domini Regis erit expectanda interpretatio & voluntas; Cum eius sit interpretari cuius est condere.* And *Britton* in the time of king *Ed. 1.* writeth as much in effect.

So as now if this question seem difficult, that neither direct law, nor Examples & Precedents, nor application of like cases, nor discourse of reason, nor the graue opinion of the learned and reuerend Iudges, can resolue it, here is a true and certain Rule, how both by the Ciuile Lawe,

and

and the ancient Common lawe of *England* it may and ought to be decided: That is, by sentence of the most religious, learned, and iudicious king that euer this kingdome or Iland had.

But this Case is so cleare as this needeth not at all.

And in this I would not be mis-vnderstoode, as though I spake of making of new Lawes, or of altering the Lawes now standing; I meane not so, but I speake on-ly of interpretation of the Lawe in new questions and doubts, as now in this present case: neither doe I meane hereby to derogate any thing from the high court of Parliament; (farre be it from my thought) It is the great Councell of the kingdome, wherein euerie subiect hath interest. And to speake of the constitution or forme of it, or how, or when it was first begunne, is for busie Questionists; It ought to bee obeyed and reuerenced, but not disputed; and it is at this time impertinent to this Question.



But certen it is, it hath beene the wisdom of the Kinges of this Realme to reserve in themselves that supreamie power to call their Nobles, Clergie, & commons together, when they sawe great and vrgent Causes; and by that great Councell to make Edicts and Statutes for the weale of their people, and safetie of the Kingdome and State, as in *Anno 10. Edw. 3.* the Assembly at *Nottingham* for the great wars in *France*: And in *Anno 20. H. 3.* *Prouision* *nes Merton*, which I remembred before.

Obiect. of  
Inconueni-  
cie and fruga-  
litie.

There haue beene made some Obiecti-  
ons of inconueniencie, as for bearing of  
Scot and Lot, and such other charges; and  
some out of frugalitie, that the king shall  
lose his profit of making Denizens, and  
such like: These are so light as I leaue  
them to the winde; They are neither fit  
for Parliament, nor Councell, nor Court.

Obiect. vpon  
diffidence.

Another argument and reason against  
the *Post-nati* hath beene lately made out



of diffidence and mistrust, that they will come into *England* sans number, and so as it were to surcharge our Common; and that this may be in *secula seculorum*. I know not well what this meanes. The Nation is ancient, noble and famous; they haue many honourable and woorthie Noble men and Gentlemen, and many wise and worthie men of all degrees and qualities; they haue lands and faire possessions in *Scotland*: Is it therefore to bee supposed, or can it in reason bee imagined, that such multitude sans number will leaue their native soile, and all transport themselues hither? Hath the Irish done so? Or those of *Wales*, or of the Isles of *Man*, *Gernesey*, and *Iersey*? Whie should we then suspect it now more for *Scotland*?

Nay, doe you suppose that the Kinge of *England* will euer suffer so great a parte of his Dominions, and so great and famous a Kingdome as *Scotland* is to be dispeopled? It is a doubt imagined without any foundation or ground of reason.

But

But if it were to bee doubted, the twelue Iudges that haue concurred in opinion, and that late worthy Iudge *Popham* had as great cause to feare it as any others: They are wise, they are learned, they haue faire possessions and good estates, They haue posteritie to care for, as others haue.

Yet, admit it bee a matter worth the doubting of, what is that to the yoong *Post-nati* that are not like in many yeares to come hither in such number? Shall we vpon this causlesse feare depriue them of their lawfull Birth-right?

Haue wee seene in these fise yeeres past anie moe of them than this one alone that haue gotten any Lands in *England*? And this little that he hath is so small and poore a portion, that his purchase is not great, and therefore no iust cause of offence to any.

*Ante-nati.*

Nay, if you looke vpon the *Ante-nati*, you shall find no such confluence hither, but some few (and very few in respect

of that great and populous kingdome) that haue done long and worthie seruice to his Maiestie, haue, and still doe attend him, which I trust no man mislikes: For, there can bee none so simple, or childish (if they haue but common sense) as to thinke that his Maiesty should haue come hither alone amongst vs, and haue left behinde him in *Scotland*, and as it were caste off, all his ould and worthie Seruants.

And if these Noble and worthie Gentlemen of *Scotland*, I meane the *Ante-nati* be louingly and brotherly entertained amongst vs, with mutuall loue & beneuolence, that so we may *coalescere*, & be vnited together, by marriage, and otherwise (as in some particular cases wee see it already happily begunne) no doubt God will bleesse this Vnion of both these Nations, and make them, and the King, and great *Britaine* to be famous through the world; and feared & redoubted of our enemies, and of all that wish vs ill: For, *Vis unita*

Q

*fortior,*

*fortior, & concordia multos facit vnum.* But what may follow vpon such arguments of diffidence and suspition, which seeme but to hinder Vnion, and to breede discord and dissention I will not speake; Let euery wise man consider it well: For, *Humana consilia castigantur, ubi coelestibus se praeserunt.* And remember Saint Paules caution, *Si inuicem mordetis, videte ne ab inuicem consumamini.*

And for the resemblance that hath bin made of this Case of *Post-nati* (but indeed for the Vnion of both Kingdomes) with the houswives cutting of her cloth by a threede, I will say but this, That if shee cut her peece of cloth in length aswell as in breadth, all the threeds will bee cutte, and the cloth marred. And this cutting in this our Case, is, to cutte all aswell in length as in breadth, euen through all the Kinges Dominions; and so will rent asunder the whole frame of the V-

nion;



nion ; and cut in peeces all the threeds of Allegiance.

But now I wil aske this question: How long shall this suspition and doubt continue? Shall there bee a dis-vnion for euer? If it bee saied, No, but vntill the Lawes, and Customes of both Kingdomes bee made one and the same: then I aske, how, and when shall that be done? And it may bee, that the Constitutions of the Countries bee such as there can hardely in all things bee such an absolute and perfect reconciling or vniting of Lawes as is fancied. Is it yet so betweene *England* and *Wales*? or betweene *Kent* and *Cornewall*? or betweene many other parts of this Kingdome? I say no ; and I speake it confidently, and truely it is not so, nor well can be so. Therefore let *England* and *Scotland* be in like degree now, as *England* and *Wales* were for many hundred yeeres, and in many things are yet still ; and yet let Vnion and Loue increase amongst vs,

A Question,  
how long this  
suspition and  
dis-vnion shall  
continue?

Bernard.

even in *secula seculorum*. Let vs not be such as Saint Bernard noteth, *Amant quod non decet, timent quod non oportet, dolent vane, gaudent vanius*. And let vs no longer make question, whether seuerall Lawes and Customes bee markes of seperation and dis-vnion, or of seuerall Allegeances; for certainly they are not.

Obiection vp-  
on Diuination

One other Reason remaines against these *Post-nati*, and that is out of a prouident foresight, or as it were a prophesying: What if a seperation of these Kingdomes fall hereafter?

Respons.

Of this I can say but *Absit omen*. It is *Potentia remota* (as Iustice Williams saied) and I trust in God *Remotissima*: And I will euer pray to God that it neuer fall so, vntill the King of all Kingdomes resume all Scepters and Kingdomes into his owne hands. And let vs take heede of sinnes of Ingratitude and Disobedience; and remember, that *Adam* and *Eue* were punished, *Non*

propter

propter pomum, sed propter vetitum. And for such Prophets, let the Prophet *Ezechiel* ca. 13. answer them, *Vae* Prophetis insipientibus qui sequuntur spiritum suum, & nihil vident. And the Prophet *Esay* speaketh to all such with an other *Vae*, *Vae* illis qui dispergunt.

Now then, as M. Solicitor beganne with seeking out the truth; so I will conclude with *Esdra*s words, *Magna est Veritas & praeualet*: And with this further, *Eatenus rationandum donec Veritas inueniatur: Cum inuenta est veritas, figendum ibi Iudicium: Et in victoria veritatis, soli veritatis inimici pereunt.*

### The Conclusion.

**T**HUS I haue heere deliuered my concurrence in opinion with my Lordes the Iudges, and the reasons that induce and satisfie my conscience, That *Ro. Caluine*, and all the *Post-nati* in Scotland, are in Reason, and by the Common Lawe of

*England* naturall borne subiects within the allegiance of the King of *England* ; and inhabited to purchase and haue free-hould and inheritance of lands in *England* ; and to bring reall actions for the same in *England*.

For , if they haue not this benefit by this blessed and happie Vnion , then are they in no better case in *England*, than the king of *Spaines* subiects borne in *Spaine*, &c. And so by this Vnion they haue gotten nothing : What they haue lost Iustice *Yeluerton* did well note.

And therefore I must giue Iudgement in the Chancerie , That the Defendants there ought to make direct answer to *Ro. Caluines* Bill for the Lands and Euidences for which he complains.

*T. Ellesmere Canc.*



